(22)

No. 05-1345
Title: United Haulers Association, Inc., et al., Petitioners
v.
Oneida-Herkimer Solid Waste Management Authority, et al.
Docketed: April 24, 2006
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (05-2024)
Decision Date: February 16, 2006

Questions Presented

Date	Proceedings and Orders
Apr 21 2006	Petition for a writ of certiorari filed. (Response due May 24, 2006)
May 15 2006	Order extending time to file response to petition to and including June 23, 2006, for all respondents.
Jun 23 2006	Brief of respondents Oneida-Herkimer Solid Waste Management Authority, et al. in opposition filed.
Jun 23 2006	Brief amici curiae of American Trucking Associations, Inc. and National Solid Waste Management Association filed.
Jul 5 2006	DISTRIBUTED for Conference of September 25, 2006.
Jul 5 2006	Reply of petitioners United Haulers Association, Inc., et al. filed. (Distributed)
Sep 26 2006	Petition GRANTED.
Oct 25 2006	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioners.
Oct 31 2006	SET FOR ARGUMENT ON Monday, January 8, 2007.
Nov 2 2006	Brief of petitioners United Haulers Association, Inc., et al. filed.
Nov 7 2006	Joint appendix filed.
Nov 13 2006	Brief amici curiae of Sussex County, Virginia and Charles City County, Virginia filed.
Nov 13 2006	Brief amicus curiae of American Trucking Associations, Inc. and National Solid Waste Management Association filed.
Nov 16 2006	Blanket consent for the filing of amicus briefs in support of either/neither party received from counsel for the respondents.
Nov 17 2006	CIRCULATED.
Dec 1 2006	Motion of Rockland Coalition for Democracy and Freedom, et al. for leave to participate in oral argument as amici curiae and for divided argument filed. (Distributed)
Dec 4 2006	Motion of New York State for leave to participate in oral argument as amicus curiae and for divided argument filed.
Dec 6 2006	Brief amicus curiae of Federation of New York Solid Waste Associations

filed. (Distributed)

Dec 6 2006	Brief amicus curiae of Rockland Coalition for Democracy and Freedom, et al. filed. Distributed).
Dec 7 2006	Brief of respondent Oneida-Herkimer Solid Waste Management Authority, et al. filed. (Distributed)
Dec 7 2006	Brief amici curiae of Onondaga County Resource Recovery Agency, et al. filed. (Distributed)
Dec 7 2006	Brief amicus curiae of Environmental Defense filed. (Distributed)
Dec 7 2006	Brief amicus curiae of Rockland County Solid Waste Management Authority filed. (Distributed)
Dec 7 2006	Brief amici curiae of Economic Development Growth Enterprises Corporation, et al. filed. (Distributed)
Dec 7 2006	Brief amici curiae of National Association of Counties, et al. filed. (Distributed)
Dec 7 2006	Brief amici curiae of New York State, et al. filed. (Distributed)
Dec 7 2006	Brief amicus curiae of Madison County, New York filed. (Distributed)
Dec 7 2006	Brief amici curiae of Arkansas Association of Regional Solid Waste Management Districts, et al. filed. (Distributed)
Dec 7 2006	Letter proposing a lodging received form counsel for amici Arkansas Association of Regional Sold Waste Management Districts, et al.
Dec 7 2006	Record received from U.S.C.A. for Second Circuit. (1 box) and motions will be transmitted to this office.
Dec 8 2006	Docket sheet recieved from U.S.D.C. for Northern District of New York. Documents in this case are eletronically filed. Exhibits, transcripts and motions will be transmitted to this office.
Dec 11 2006	Motion of Rockland Coalition for Democracy and Freedom, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED.
Dec 11 2006	Motion of New York State for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Dec 22 2006	Exhibits received from U.S.D.C. for Nothern District of New York. (2 boxes)
Dec 26 2006	Reply of petitioners United Haulers Association, Inc., et al. filed. (Distributed)
Jan 8 2007	Argued. For petitioners: Evan Tager, Washington, D.C. For respondents: Michael J. Cahill, Holbrook, N.Y.; and Caitlin J. Halligan, Solicitor General, New York, N.Y. (for New York, as amicus curiae.)
Jan 10 2007	Motion to file a supplemental brief after argument filed by petitioners. (Distributed)
Jan 16 2007	Respondents' opposition to petitioners' motion to file a supplemental brief after oral argument. Distributed.

Supreme Court, U.S.
FILED
(1)
05 1345 APR 21 2006
OFFICE OF THE CLERK

No. 05-

In the Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., AND INGERSOLL PICKUP INC.,

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, AND COUNTY OF HERKIMER

Respondents.

On Petition for a Writ of Certiorari to United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

EVAN M. TAGER
Counsel of Record
MIRIAM R. NEMETZ
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

This Court held in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 386 (1994), that "a so-called flow control ordinance, which require[d] all solid waste to be processed at a designated transfer station before leaving the municipality," discriminated against interstate commerce and was invalid under the Commerce Clause because it "deprive[ed] competitors, including out-of-state firms, of access to a local market." This case presents two questions, the first of which is the subject of an acknowledged circuit conflict:

1. Whether the virtually *per se* prohibition against "hoard[ing] solid waste" (*id.* at 392) recognized in *Carbone* is inapplicable when the "preferred processing facility" (*ibid.*) is owned by a public entity.

2. Whether a flow-control ordinance that requires delivery of all solid waste to a publicly owned local facility and thus prohibits its exportation imposes so "insubstantial" a burden on interstate commerce that the provision satisfies the Commerce Clause if it serves even a "minimal" local benefit.

RULE 29.6 STATEMENT

None of petitioners has a parent company and no publicly held company owns 10% or more of the stock of any of the petitioners.

TABLE OF CONTENTS

Page

QUESTION PRESENTED I

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 11

I. THE SECOND CIRCUIT'S PUBLIC-PRIVATE DISTINCTION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND UNJUSTIFIABLY LIMITS *CARBONE* 13

A. The Second Circuit's Approach Has Been Rejected By The Sixth Circuit And Is In Tension With Decisions Of Several Other Circuits 13

B. The Decision Below Is Inconsistent With This Court's Commerce Clause Decisions 16

1. The decision below conflicts with *Carbone* 16

2. The decision below is irreconcilable with this Court's renunciation of the use of formalistic distinctions in resolving Commerce Clause challenges 20

3. The decision below is in tension with this Court's "market participant" cases 21

TABLE OF CONTENTS—continued

Page

C. The Issue Presented Is Important And Should Be Resolved Now 23

II. THE SECOND CIRCUIT'S CONSTRUCTION OF *PIKE* CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND OF THIS COURT 25

A. The Holding That Flow Control To A Government-Owned Facility Imposes Only An "Insubstantial" Burden On Interstate Commerce Conflicts With Decisions Of Other Circuits 25

B. The Decision Below Misconstrues The *Pike* Test 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases:

A.C.L.U. v. Johnson, 194 F.3d 1149 (10th Cir. 1999) 28

Am. Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266 (1987) 29, 30

Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders, 48 F.3d 701 (3d Cir. 1995) 15

Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys. Inc., 155 F.3d 59 (2d Cir. 1998)) 26

Ben Oehrleins & Sons & Daughter v. Hennepin County, 115 F.3d 1372 (8th Cir. 1997) 23, 24

Bibb v. Navaho Freight Lines, Inc., 359 U.S. 520 (1959) 30

Blue Circle Cement, Inc. v. Board of County Comm'rs, 27 F.3d 1499 (10th Cir. 1994) 28

Brimmer v. Rebman, 138 U.S. 78 (1891) 29

Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986) 28-29

C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) ..... *passim*

Chambers Med. Techs., Inc. v. Bryant, 52 F.3d 1252 (4th Cir. 1995) 27

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 3

Coastal Carting Ltd. v. Broward County, 75 F. Supp. 2d 1350 (S.D. Fla. 1999) 23

TABLE OF AUTHORITIES—continued

Page(s)

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977) 21

Dorrance v. McCarthy, 957 F.2d 761
(10th Cir. 1992) 28

East Coast Recycling, Inc. v. City of Port St. Lucie,
234 F. Supp. 2d 1259 (S.D. Fla. 2002) 15

Edgar v. MITE Corp., 457 U.S. 624 (1982) 28

*Empire Sanitary Landfill, Inc. v. Commonwealth of
Pennsylvania*, 684 A.2d 1047 (Pa. 1996) 23

Freedom Holdings Inc. v. Spitzer, 357 F.3d 205
(2d Cir. 2004) 25

Harvey & Harvey, Inc. v. County of Chester,
68 F.3d 788 (3d Cir. 1995) 14

Heier's Trucking, Inc. v. Waupaca County,
569 N.W.2d 352 (Wis. Ct. App. 1997) 15

Hughes v. Alexandria Scrap Corp.,
426 U.S. 794 (1976) 22

Huish Detergents, Inc. v. Warren County,
214 F.3d 707 (6th Cir. 2000) 14

Hunt v. Washington State Apple Adver. Comm'n,
432 U.S. 333 (1977) 29

*IESI AR Corp. v. Northwest Arkansas Regional Solid
Waste Mgmt. Dist.*, 433 F.3d 600 (8th Cir. 2006) 24

McNeilus Truck & Mfg., Inc. v. Ohio,
226 F.3d 429 (6th Cir. 2000) 27-28

TABLE OF AUTHORITIES—continued

Page(s)

Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Regional Solid Waste Mgmt. Auth., 389 F.3d 491 (5th Cir. 2004) 15, 26

Nat'l Solid Waste Mgmt. Ass'n. v. Pine Belt Solid Waste Mgmt. Auth., 261 F. Supp. 2d 644 (S.D. Miss. 2003), rev'd in part, dismissed in part, 389 F.3d 491 (5th Cir. 2004) 15, 24

Nat'l Solid Waste Mgmt. Ass'n v. Daviess County, 434 F.3d 898 (6th Cir. 2006) 13, 14, 15, 20

Nippert v. City of Richmond, 327 U.S. 416 (1946) 30

On the Green Apartments L.L.C. v. City of Tacoma, 241 F.3d 1235 (9th Cir. 2001) 24

PSINet, Inc. v. Chapman, 362 F.3d 227 (4th Cir. 2004) 27

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) ..... *passim*

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) 21

R & M Oil & Supply, Inc. v. Saunders, 307 F.3d 731 (8th Cir. 2002) 27

Randy's Sanitation, Inc. v. Wright County, 65 F. Supp. 2d 1017 (D. Minn. 1999) 24

Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978) 30

South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984) 21, 22, 23

Southcentral Pa. Waste Haulers Ass'n v. Bedford-Fulton-Huntington Solid Waste Auth., 877 F. Supp. 935 (M.D. Pa. 1994) 9, 23

TABLE OF AUTHORITIES—continued

Page(s)

Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U.S. 761 (1945) 30

SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2d Cir. 1995) 7, 23

Trinova Corp. v. Michigan Dep't of Treasury, 498 U.S. 358 (1991) 21

U & I Sanitation v. City of Columbus, 205 F.3d 1063 (8th Cir. 2000) 23, 26, 27

Vince Refuse Serv., Inc. v. Clark County Solid Waste Mgmt. Dist., 1995 WL 253121 (S.D. Ohio Mar. 7, 1995) 24

Waste Mgmt., Inc. v. Metropolitan Gov't, 130 F.3d 731 (6th Cir. 1997) 14

Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth., 814 F. Supp. 1566 (M.D. Ala. 1993), aff'd per curiam, 29 F.3d 641 (11th Cir. 1994) 15

Waste Sys. Corp. v. County of Martin, 985 F.2d 1381 (8th Cir. 1993) 15

West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994) 20-21

Zenith/Kremer Waste Sys., Inc. v. Western Lake Superior Sanitary Dist., 1996 WL 612465 (D. Minn. July 2, 1996) 23

Constitution And Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1292(a)(1) 8

TABLE OF AUTHORITIES—continued

Page(s)

42 U.S.C. § 1983 6

U.S. Const. art 1, § 8 2

Miscellaneous:

United States Environmental Protection Agency, Report to Congress: *Flow Controls and Municipal Solid Waste* II-1 to II-5 (Mar. 1995)..... 24

PETITION FOR A WRIT OF CERTIORARI

Petitioners United Haulers Association, Inc., Transfer Systems, Inc., Bliss Enterprises, Inc., Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial Containers, Inc., and Ingersoll Pickup Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals are reported at 261 F.3d 245 (*"United Haulers I"*) (App., *infra*, 22a-53a) and 438 F.3d 150 (*"United Haulers II"*) (App., *infra*, 1a-21a). The decisions of the United States District Court for the Northern District of New York initially granting summary judgment in favor of plaintiffs (App., *infra*, 103a-117a) and, following remand, granting summary judgment in favor of defendants (App., *infra*, 54a-74a) are unreported. The Report and Recommendation of the United States Magistrate Judge (App., *infra*, 75a-102a) is unreported.

JURISDICTION

The judgment of the Second Circuit was entered on February 16, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 2(d) of Oneida County Board of Legislators Resolution No. 301 provides in relevant part:

> From the time of placement of solid waste and of recyclables at the roadside or other designated area approved by the County, or by the [Oneida-Herkimer Solid Waste Management] Authority pursuant to contract with the County, by a person for collection in accordance herewith, such solid waste and recycla-

> bles shall be delivered to the appropriate facility, entity or person responsible for disposition designated by the County or by the Authority pursuant to contract with the Authority.

Resolution No. 301 is set forth in full at App., *infra*, 118a-130a.

Section 2(c) of Herkimer County Local Law, Introductory No. 1 - 1990, provides in relevant part:

> After placement of garbage and of recyclable materials at the roadside or other designated area approved by the Legislature by a person for collection in accordance herewith, such garbage and recyclable material shall be delivered to the appropriate facility designated by the Legislature, or by the [Oneida-Herkimer Solid Waste Management] Authority pursuant to contract with the County.

Herkimer County Local Law, Introductory No. 1 - 1990, is set forth in full at App., *infra*, 131a-143a.

Article I, Section 8 of the U.S. Constitution provides in relevant part:

> The Congress shall have Power * * * To regulate Commerce * * * among the several States * * *.

STATEMENT

In *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), this Court held invalid under the dormant Commerce Clause a local ordinance that required all municipal solid waste within the town to be delivered to a transfer station that was built by a private company at the town's instigation and that was to be sold to the town for $1 after five years (the time it was expected to take the private entity to recoup its investment). The facts of the present case are virtually identical, except that the facilities designated to receive waste have been owned from day one by a public entity.

The court of appeals concluded that this distinction made a dispositive difference. It held that there can be no discrimination against interstate commerce when the favored business is publicly owned. Accordingly, it ruled that the flow-control laws were not subject to the "virtually *per se* rule of invalidity" applicable to discriminatory regulations (*City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)), but instead should be evaluated under the balancing test outlined in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), which held that an evenhanded regulation "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." Adopting an idiosyncratic understanding of the *Pike* test, the court of appeals then ruled that, because the costs of the flow-control laws "do[] not appear to fall differentially on the shoulders of any identifiable private or governmental entity" (App., *infra*, 16a), they imposed, at most, an "insubstantial" burden on interstate commerce (*id.* at 18a) that was easily outweighed by the ostensible benefits of the provisions.

These holdings threaten to render *Carbone* a dead letter wherever they are followed, because it is a simple matter for municipalities to structure (or restructure) transactions so that they have record title to the preferred facilities. Moreover, because the rulings conflict with decisions of other Circuits, they create uncertainty about the governing law that will interfere with the establishment of long-term arrangements for solid waste management. The question whether *Carbone* can be circumvented by public ownership of the preferred facilities thus is a recurring issue of great significance that warrants this Court's immediate attention.

The pertinent facts are simple and undisputed.

1. *Waste Collection in Oneida and Herkimer Counties.* Oneida and Herkimer Counties are sparsely populated counties in upstate New York. Historically, collection of trash has been a private function in these counties. Most local govern-

ments in Oneida and Herkimer Counties have never assumed responsibility for trash collection, and residents and businesses in most parts of the Counties must contract with private haulers for the removal of their waste. See 2d Cir. II J.A. 201.[1]

2. *The Imposition of Flow Control in Oneida and Herkimer Counties.* In September 1988, at the request of Oneida and Herkimer Counties, the New York State Legislature created the Oneida-Herkimer Solid Waste Management Authority ("the Authority"). App., *infra*, 57a-58a, 78a. In May and December 1989, the Authority entered into contracts with the Counties that required the Authority to purchase, operate, construct, and develop facilities for the processing and/or disposal of solid waste and recyclables generated in the Counties. For their part, the Counties agreed to ensure the delivery of all solid waste generated within their borders to facilities designated by the Authority. *Id.* at 58a, 79a.

In December 1989, Oneida County passed the required flow-control ordinance. The ordinance specifies that all solid waste and recyclables left at curbside must "be delivered to the appropriate facility, entity or person responsible for disposition designated by the County or by the Authority * * *." App., *infra*, 122a. Under the ordinance, any hauler handling waste generated in the County must have a valid permit issued by the County or the Authority (*id.* at 127a) and must deliver all construction debris, green waste, commercial and industrial waste, curbside recyclables, major appliances and tires, household hazardous waste, and infectious waste to designated facilities (*id.* at 122a, 124a-127a). Penalties for noncompliance include permit revocation, fines, and impris-

---

[1] Citations to the joint appendix filed in the Second Circuit in *United Haulers I* are designated "2d Cir. I J.A. __." Citations to the joint appendix filed in the Second Circuit in *United Haulers II* are designated "2d Cir. II J.A. __."

onment. *Id.* at 129a-130a. Herkimer County enacted an almost identical flow-control ordinance in February 1990. *Id.* at 131a-143a.

The Authority's Solid Waste Plan expressly contemplates "the development of a new long-term landfill site to accommodate the non recyclable portion of the waste stream" of the two Counties. 2d Cir. I J.A. 210. Pending development of its own landfill, however, the Authority needed to construct a local transfer station to store, transfer, and consolidate municipal solid waste. In June 1991, the Authority contracted with a private entity (Empire Sanitary Landfill of Taylor, Pennsylvania ("Empire")) for the design, construction, and operation of a transfer station in Utica, Oneida County, with subsequent disposal of the waste in Empire's landfill in Pennsylvania. App., *infra*, 27a-28a.[2] The contract required the Authority to divert all solid waste generated in the Counties (except recyclables and waste burned at the Authority's incinerator) to the Utica Transfer Station. 2d Cir. I J.A. 278, 290. Consistent with this agreement, the Authority's Rules and Regulations expressly require haulers to "deliver all acceptable solid waste and curbside collected recyclables generated within Oneida and Herkimer Counties to an Authority designated facility." App., *infra*, 28a; 2d Cir. I J.A. 45

When this action commenced in 1995, the Authority had designated five Authority-owned facilities for the processing and/or disposal of solid waste and recyclables generated in the Counties—an incinerator, a recycling center, an ash landfill, a green waste compost facility, and the Utica Transfer

---

[2] After the agreement with Empire expired in 1998, Waste Management of New York was selected to operate the transfer station. See Dkt. No. 148, Ex. 30. Under that contract, waste is transported to a landfill in Fairport, New York. See *id.* at 2.

Station. 2d Cir. I J.A. 457-458.[3] At that time, the monopolistic tipping fee at the transfer station was $86 per ton. App., *infra*, 107a; 2d Cir. I J.A. 455. As the Second Circuit recognized, "[e]ven the lowest tipping fee charged under the Counties' scheme is higher than the market value for the disposal services the Authority provides." *Id.* at 29a. Indeed, petitioners submitted evidence that, if permitted to do so, they could dispose of waste they collect in Oneida and Herkimer Counties at out-of-state facilities for as little as $26 per ton. 2d Cir. I J.A. 463, 464; see also *id.* at 429-430, 440-441 ($37 per ton to $55 per ton, including transportation); *id.* at 446-447 ($39.20 per ton, including transportation, for construction and demolition waste).

The flow control provisions direct more than 200,000 tons of solid waste per year to the County-designated facilities (2d Cir. II J.A. 202), generating revenues of more than $16 million for the Authority annually. See Dkt. No. 148, Ex. 29, at 3.

3. *The Complaint and the Initial Grant of Summary Judgment to Plaintiffs.* In April 1995, petitioners—six haulers that operated in Oneida and Herkimer Counties and a trade association—filed suit against the Authority and both Counties, alleging that the flow-control ordinances and the Authority's Rules and Regulations (collectively "the flow-control laws") violate the dormant Commerce Clause and that, in enforcing those laws, defendants deprived them of their constitutional rights in violation of 42 U.S.C. § 1983. On March 31, 2000, the district court granted plaintiffs' motion for summary judgment, concluding that the flow-control laws violated the dormant Commerce Clause.

---

[3] Subsequently, the Authority designated two additional transfer stations, a stump disposal facility, and a household hazardous waste facility. See Dkt. No. 148, Ex. 29, at 5.

The district court found the unconstitutionality of the flow-control laws to be conclusively established by *Carbone*. It explained:

> These flow control laws are virtually indistinguishable from the laws examined and struck down in both *Carbone* and *SSC Corp. [v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995)]. * * * Courts have considered it almost a foregone conclusion that flow control laws violate the dormant commerce clause. * * * I accordingly conclude that the flow control laws in Oneida and Herkimer counties also violate the dormant commerce clause. The laws are discriminatory and *per se* invalid.

App., *infra*, 111a.

The court rejected defendants' contention that the challenged laws could be distinguished on the ground that they constitute "an inextricable part of a public waste management system for the local management of local waste," stating: "[T]he relevant case law consistently has extracted flow control laws as an improper element of general waste management schemes." *Id.* at 113a. And in response to defendants' argument that "they merely have restructured the private collection market and prohibited haulers from crossing over into the disposal market," the district court explained:

> [T]he flow control laws dictate where the haulers must bring local solid waste and at what price. Although defendants contend repeatedly that their system treats all parties alike with respect to disposal services, what they actually are doing is hoarding all local solid waste for the benefit of a preferred local disposal facility.

Id. at 113a-114a.

Having found the flow-control laws unconstitutional, the district court enjoined their enforcement and referred the

matter to the magistrate judge for determination of damages. *Id.* at 116a. Defendants appealed under 28 U.S.C. § 1292(a)(1).

4. *The First Appeal: United Haulers I.* The Second Circuit reversed. It concluded that "the district court erred in its Commerce Clause analysis by failing to recognize the distinction between private and public ownership of the favored facility" (App., *infra*, 39a) and held that "a municipal flow control law does not discriminate against out-of-state interests in violation of the Commerce Clause when it directs all waste to publicly owned facilities" (*id.* at 40a).

The court professed uncertainty as to whether this Court had accepted or rejected the "public-private distinction" in *Carbone*, stating that the majority's "language can fairly be described as elusive on that point." App., *infra*, 45a. But it found "precedential support" (*id.* at 50a) for such a distinction in the "local processing cases" upon which the Court relied in *Carbone*. Noting that in each case the favored businesses were private entities (*id.* at 45a), it reasoned that "[t]he common thread in the Court's dormant Commerce Clause jurisprudence * * * is that a local law discriminates against interstate commerce when it hoards local resources *in a manner* that favors local business, industry or investment over out-of-state competition" (*id.* at 47a (emphasis in original)). Relying on Justice Souter's dissent in *Carbone*, the court found there to be "sound reason for the Court's consistent, although often unstated, recognition of the distinction between public and private ownership of favored facilities," namely that "'[r]easons other than economic protectionism are * * * more likely to explain the design and effect of an ordinance that favors a public facility.'" *Ibid.* (quoting *Carbone*, 511 U.S. at 421 (Souter, J., dissenting)).

The Second Circuit recognized that other courts had struck down flow-control laws that favored publicly owned waste disposal facilities. App., *infra*, 49a-50a. It rejected

those cases, however, on the ground that "their holdings are not binding * * * and have little persuasive value given that the courts did not directly address the issue we decide today." *Id.* at 50a. As for the one case that did directly address the issue—*Southcentral Pennsylvania Waste Haulers Ass'n v. Bedford-Fulton-Huntington Solid Waste Authority*, 877 F. Supp. 935, 943 (M.D. Pa. 1994)—the court stated: "We * * * respectfully disagree with that decision for the reasons already discussed." *Ibid.*

The Second Circuit accordingly held that the district court erred in applying the strict level of scrutiny applicable to discriminatory legislation and instead should have applied the more lenient balancing test articulated in *Pike*. Although admitting that it was tempted to apply *Pike* itself (and presumably uphold the laws under it), the court satisfied itself with remanding the case to the district court with a very strong hint as to how to rule. See App., *infra*, 52a. The plaintiffs filed a petition for a writ of certiorari, which was denied. 534 U.S. 1082 (2002).

5. *District Court Proceedings on Remand.* Upon remand, the parties conducted discovery and then filed cross-motions for summary judgment. Dkt. Nos. 145, 152, 160. The magistrate judge recommended granting summary judgment in favor of defendants. App., *infra*, 101a-102a.

According to the Report and Recommendation of the magistrate judge, the flow-control laws do not impose ***any*** burden on interstate commerce that is cognizable under the *Pike* test. App., *infra*, 99a. In the view of the magistrate judge, "[t]he critical inquiry" under *Pike* "is whether an out-of-state business is treated less favorably than one similarly situated but within the state." *Id.* at 95a. Because the Counties' flow-control laws treat "a local private trash business * * * no differently * * * than one situated out of state" (*id.* at 96a), the magistrate judge concluded that there was no need to "proceed to the next step of balancing the burdens against

the putative benefits associated with the legislation." *Id.* at 99a.

Over plaintiffs' objections, the district court adopted the Report and Recommendation in its entirety. App., *infra*, 74a. The district court stated:

> [P]laintiffs here have not and cannot identify "**any** in-state commercial interest that is favored, directly or indirectly," by the waste management legislation enacted by defendants at the expense of out-of-state competitors. In the absence of evidence that the flow control laws impacted interstate commerce differently than intrastate commerce, there were no detrimental "effects" to weigh against the putative benefits of the legislation. Thus, it was not error, as plaintiffs contend, for the Magistrate Judge to decline to engage in the second part of the *Pike* balancing test by weighing non-existent burdens against obvious benefits.

Id. at 70a (emphasis in original; citations omitted); see also *id.* at 67a (there could be no violation of the Commerce Clause where there was "no distinction in the treatment of in-state versus out-of-state businesses"). The district court dismissed the complaint, and plaintiffs appealed.

6. *The Second Appeal: United Haulers II.* The Second Circuit affirmed. The court acknowledged that the Authority had "employed its regulatory powers to compel delivery of the waste generated within the Counties to its processing facility." App., *infra*, 12a. The court further recognized that the regulations "impose a type of export barrier on the Counties' unprocessed waste" in that they have "the direct and clearly intended effect of prohibiting articles of commerce generated within the Counties from crossing intrastate and interstate lines." *Id.* at 13a. Thus, the court conceded, the Counties' flow-control laws have "removed the waste generated in Oneida and Herkimer Counties from the national marketplace for waste processing services, a result which tradition-

ally has been thought to implicate a central purpose of the Commerce Clause." *Id.* at 15a.

The court was reluctant, however, to conclude that this trade barrier imposed "a differential burden triggering the need for *Pike* analysis." App., *infra*, at 16a. It explained: "[W]e think the courts have safeguarded the ability of commercial goods to cross state lines primarily as a means to protect the right of businesses to compete on equal footing wherever they choose to operate" (*id.* at 18a) and to enable "states and municipalities to exercise their police powers without undue interference from the laws of neighboring jurisdictions" (*ibid.*). Because the Counties' waste export ban did not, in its view, implicate these concerns, the court found it to be unclear whether the flow-control laws imposed ***any*** cognizable burden on interstate commerce.

The court ultimately declined to decide whether the flow-control laws impose a burden cognizable under *Pike*. App., *infra*, 16a. Instead, it held that any such burden was so "insubstantial" or "slight" (*id.* at 18a) that it would be outweighed by even a "minimal showing of local benefit" (*ibid.*). But the court made clear that, in assessing the "*degree* to which [the provisions] might burden interstate commerce" (*ibid.* (emphasis in original)), it found it "critical" (*ibid.*) that "the purported differential burden does not appear to fall differentially on the shoulders of any identifiable private or governmental entity" (*id.* at 15a-16a). Concluding that the benefits of the flow-control laws "easily clear" the low hurdle it had just established for them, the court held that the provisions satisfy the *Pike* test. *Id.* at 18a.

REASONS FOR GRANTING THE PETITION

In *Carbone*, this Court recognized that flow-control provisions erect overt barriers to interstate trade that implicate the core purposes of the dormant Commerce Clause, and, accordingly, ruled that such measures are subject to the most stringent level of scrutiny. The Second Circuit now has held

that, when public entities hold title to the designated facilities, flow-control provisions are not subject to virtually *per se* invalidation but instead impose such an "insubstantial" burden on interstate commerce that they will be upheld upon even a "minimal" showing of local benefit.

The Second Circuit's ruling that there is a "public facilities" exception to *Carbone* is flatly at odds with a recent decision of the Sixth Circuit, which expressly rejected the reasoning of the decision below and invalidated flow-control regulations exactly like those at issue here. The pointed disagreement between these two courts clearly will not be resolved without this Court's intervention. Unless this Court grants certiorari, moreover, the existing circuit conflict will spread as other courts have the opportunity to address both the flow-control provisions that have already been adopted in the decision's wake and the additional provisions that will surely be adopted if the decision becomes final.

Unless other courts are quick to reject the Second Circuit's position—thus confining this form of flow control to one region—the eagerness of many localities to hoard demand for waste processing services will lead to the "pervasive flow control" that Justice O'Connor feared would "severely impair[]" the interstate market in waste services. At the same time, the constitutionality of these provisions will remain in doubt, threatening to upend the arrangements and expectations of both public and private entities engaged in waste management activities. The prospect that this form of flow control will spread is unfortunate, because the decision below is inconsistent with *Carbone* itself and with other important strands of this Court's dormant Commerce Clause jurisprudence.

The lower court's ruling that the flow-control laws satisfy the *Pike* test is also problematic. Having decided that the flow-control laws should not be invalidated as discriminatory, the court of appeals purported to apply the balancing

analysis applicable to even-handed regulations that incidentally burden interstate commerce. But the court put a heavy thumb on the scale when it evaluated whether the burdens associated with respondents' flow-control laws outweigh the putative local benefits. Although the court acknowledged that the flow-control laws erect a trade barrier that blocks exportation of demand for waste processing services, it deemed that burden "insubstantial" (App., *infra*, 18a) because it "does not appear to fall differentially on the shoulders of any identifiable private or governmental entity" (*id.* at 15a-16a).

The Second Circuit's ruling that *Pike* applies meaningfully only if there is a "differential" burden on out-of-state entities has been adopted by the Fifth Circuit but conflicts with decisions of other circuits and this Court. Because no regulation will ever be invalidated under the *Pike* test where this rule is followed, the decision below merits review.

I. THE SECOND CIRCUIT'S PUBLIC-PRIVATE DISTINCTION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND UNJUSTIFIABLY LIMITS *CARBONE*

A. The Second Circuit's Approach Has Been Rejected By The Sixth Circuit And Is In Tension With Decisions Of Several Other Circuits.

A recent decision of the Sixth Circuit squarely conflicts with the decision below. In *National Solid Waste Management Ass'n v. Daviess County*, 434 F.3d 898 (6th Cir. 2006), the court assessed the constitutionality of a flow-control provision requiring all waste generated within Daviess County, Kentucky, to be deposited at facilities owned by the County. Applying *Carbone*, the court found there to be "little doubt" that the provision "discriminates against interstate commerce." *Id.* at 905. "By forcing [plaintiffs] to use Defendant's disposal and transfer facilities," the court held, "the Ordinance would prohibit these members from using other in-

state and out-of-state facilities" and hence was "facially discriminatory against out-of-state interests." *Ibid.*

The Sixth Circuit expressly "decline[d] to adopt" the "private-public ownership distinction" recognized by the Second Circuit in *United Haulers I*. *Id.* at 909. It noted that it had "already found dormant Commerce Clause violations in cases where the facility was publicly owned." *Id.* at 910.[4] Moreover, it "respectfully disagreed" with the Second Circuit's view that the public-private distinction could be squared with *Carbone*. The court pointed out that this Court's focus in *Carbone* "was on the harm to out-of-state businesses and the local market, as opposed to the benefit conferred to the local provider." *Id.* at 910-911. As the court observed, "this harm would occur regardless of who owned the benefited facility." *Ibid.* The Sixth Circuit further noted that Clarkstown's transfer station was "quite clearly owned in fact by the municipality" (*id.* at 912)—permitting the inference that this Court, in striking down Clarkstown's flow-control ordinance, had "implicitly rejected the public-private distinction." *Ibid.*

Like the Sixth Circuit in cases preceding *Daviess*, the Third and Eighth Circuits have held that flow-control provisions favoring publicly owned facilities are discriminatory. See *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 794, 809-810 (3d Cir. 1995) (two of the three designated facilities in one of two consolidated cases were publicly owned; case remanded for determination of whether process

---

[4] See *Huish Detergents, Inc. v. Warren County*, 214 F.3d 707, 715-716 (6th Cir. 2000) (ordinance requiring all waste to be processed at county-owned transfer station discriminated against interstate commerce); *Waste Mgmt., Inc. v. Metropolitan Gov't.* 130 F.3d 731, 733, 736 (6th Cir. 1997) (striking down flow-control ordinance that required all residential waste to be disposed of at publicly owned facility).

of designating facilities was discriminatory); *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701 (3d Cir. 1995) (holding that New Jersey regulations requiring flow control discriminated against interstate commerce, and making no distinction based on whether preferred facility is publicly or privately owned); *Waste Sys. Corp. v. County of Martin*, 985 F.2d 1381, 1383 (8th Cir. 1993) (striking down ordinance that required all waste to be delivered to facility owned by waste district); see also *Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth.*, 814 F. Supp. 1566 (M.D. Ala. 1993) (striking down flow-control ordinance that required all waste to be disposed of at publicly owned facility), aff'd per curiam, 29 F.3d 641 (11th Cir. 1994); *Heier's Trucking, Inc. v. Waupaca County*, 569 N.W.2d 352 (Wis. Ct. App. 1997) (affirming order striking down ordinance that required recyclables to be delivered to County-owned processing facility). Although these decisions "d[o] not directly address the public-private ownership issue raised by *United Haulers*," they carry the "necessary implication * * * that public ownership did not change the dormant Commerce Clause inquiry." *Daviess*, 434 F.3d at 910.[5]

---

[5] A federal district court in Mississippi also held that a flow-control ordinance favoring a publicly owned facility was unconstitutional after expressly rejecting the reasoning of *United Haulers I*. See *Nat'l Solid Waste Mgmt. Ass'n. v. Pine Belt Solid Waste Mgmt. Auth.*, 261 F. Supp. 2d 644, 649-650 (S.D. Miss. 2003), rev'd in part, dismissed in part, 389 F.3d 491 (5th Cir. 2004). The Fifth Circuit held that the plaintiffs lacked standing to claim that the ordinance was discriminatory, thus leaving for another day the question whether the ordinance is invalid under *Carbone*. See 389 F.3d at 500. In contrast, a district court in Florida relied on *United Haulers I* as grounds for upholding a flow-control measure favoring public facilities. See *East Coast Recycling, Inc. v. City of Port St. Lucie*, 234 F. Supp. 2d 1259, 1267 (S.D. Fla. 2002).

B. The Decision Below Is Inconsistent With This Court's Commerce Clause Decisions.

1. The decision below conflicts with *Carbone*.

In *Carbone*, this Court rejected the notion that flow control is permissible when the designated facility is publicly owned. The decision below therefore conflicts with *Carbone*.

1. *Carbone* involved an ordinance that required that all solid waste within the defendant town's borders be brought for processing to a particular transfer station designated by the town. The transfer station was constructed by a private entity, which, by agreement with the town, was to operate the facility for five years, whereupon the town was to purchase the facility for $1. 511 U.S. at 387. The town guaranteed that the facility would receive a minimum of 120,000 tons of waste annually and authorized the contractor to charge a tipping fee of $81 per ton, a rate that exceeded the market rate. *Ibid.* "The object of this arrangement was to amortize the cost of the transfer station: The town would finance its new facility with the income generated by the tipping fees." *Ibid.*

This Court held that, because the town's flow-control ordinance "attains this goal by depriving competitors, including out-of-state firms, of access to a local market, * * * the flow control ordinance violates the Commerce Clause." *Id.* at 386. It explained that, in this context, "the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it." *Id.* at 391. "With respect to this stream of commerce, the flow control ordinance discriminates, for it allows only the favored operator to process waste that is within the limits of the town." *Ibid.*

The Court saw the challenged flow-control ordinance as "just one more instance of local processing requirements that we long have held invalid." *Ibid.* It stated:

> The essential vice in laws of this sort is that they bar the import of the processing service. * * * The flow

> control ordinance has the same design and effect. It hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility. * * * The flow control ordinance at issue here squelches competition in the waste-processing service altogether, leaving no room for investment from outside.

Id. at 392. Having found the ordinance to discriminate against interstate commerce, the Court determined that flow control was not the least discriminatory means of achieving any legitimate local interest (*id.* at 392-394) and accordingly held that the ordinance violated the Commerce Clause.

Justice O'Connor concurred in the judgment. In her view, the flow-control ordinance did not discriminate against interstate commerce because "the garbage sorting monopoly is achieved at the expense of all competitors, be they local or nonlocal." *Id.* at 404. She nevertheless concluded that the ordinance failed the *Pike* balancing test. She explained that, in ascertaining the burden on commerce, it is necessary to consider "what effect would arise if not one, but many or every, jurisdiction adopted similar legislation." *Id.* at 406 (internal quotation marks and brackets omitted). She observed that "pervasive flow control would result in the type of balkanization the [Commerce] Clause is primarily intended to prevent." *Ibid.* She therefore concluded that "the burden [the challenged ordinance] imposes on interstate commerce is excessive in relation to [the town's] interest in ensuring a fixed supply of waste to supply its project." *Id.* at 407.

Justice Souter (joined by the Chief Justice and Justice Blackmun) dissented. The dissenters believed that the majority had "underestimate[d] or overlook[ed]" "both analytical and practical differences between this and the earlier [local] processing cases" that "should prevent this case from being decided the same way." *Id.* at 416. Specifically, they argued, ***"the one proprietor * * * favored [by the challenged flow control ordinance] is essentially an agent of the mu-***

nicipal government * * *. Any discrimination worked by [the ordinance] thus fails to produce the sort of entrepreneurial favoritism we have previously defined and condemned as protectionist." *Ibid.* (emphasis added). The dissenters further explained:

> While our previous local processing cases have barred discrimination in markets served by private companies, ***Clarkstown's transfer station is essentially a municipal facility, built and operated under a contract with the municipality and soon to revert entirely to municipal ownership.*** * * * The majority ignores this distinction between public and private enterprise, equating [the ordinance's] "hoard[ing]" of solid waste for the municipal transfer station with the design and effect of ordinances that restrict access to local markets for the benefit of local private firms. * * * Reasons other than economic protectionism are * * * more likely to explain the design and effect of an ordinance that favors a public facility. * * * ***An ordinance that favors a municipal facility, in any event, is one that favors the public sector***, and if we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position, then surely this Court's dormant Commerce Clause jurisprudence must itself see that favoring state-sponsored facilities differs from discriminating among private economic actors, and is much less likely to be protectionist.

Id. at 419-421 (emphasis added; internal quotation marks, citations, and footnote omitted). The dissenters concluded that the ordinance should be upheld because it "conveys a privilege ***on the municipal government alone***, the only market participant that bears responsibility for ensuring that ade-

quate trash processing services continue to be available to Clarkstown residents." *Id.* at 430 (emphasis added).

2. The Second Circuit's assertion that this Court did not already consider and reject the public/private distinction in *Carbone* is untenable. That distinction was the centerpiece of a vigorously argued dissent. Obviously aware of this central contention of the dissent, the Court nonetheless stated that, "having elected to use the open market to earn revenues for ***its*** project, the town may not employ discriminatory regulation to give that project an advantage over rival businesses from out of State." *Id.* at 394 (emphasis added). This Court thus evidently (and, quite correctly, under the circumstances) regarded the fact of ownership as a formality: as the dissent itself contended, for all practical purposes, the transfer station was "essentially a municipal facility" (*id.* at 419), which was to be formally transferred to the town the following year. If the Court had intended its holding to preclude the flow-control ordinance only for the year until the town was to receive record title to the facility, it surely would have said so.

Moreover, the core reasoning of the majority opinion applies fully regardless of the identity of the owner of the preferred facility. As the Court observed:

> The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.

Id. at 390. Local processing laws run afoul of this "central rationale" because "they bar the import of the processing service." *Id.* at 392. Specifically, the challenged flow-control ordinance impermissibly discriminated because "it allow[ed] only the favored operator to process waste that [was] within the limits of the town." *Id.* at 391.

Whether the owner of the preferred facility is a private business or a public entity, a flow-control law, by "allow[ing] only the favored operator to process waste that is within the limits of the town," constitutes "economic protectionism" of that preferred local facility and threatens to result in "retaliatory measures." See *id.*; see also *Daviess*, 434 F.3d at 911 (concerns about "aiding local enterprise at the expense of rival businesses * * * remain regardless of whether the municipality owns the favored business"). Indeed, as discussed further below, if the Second Circuit's public-private distinction is left standing, it is predictable that municipalities around the country will take advantage of the ruling to establish (or revive) their own flow-control laws, with the result being that interstate commerce in the service of waste processing will be dramatically impeded.

2. The decision below is irreconcilable with this Court's renunciation of the use of formalistic distinctions in resolving Commerce Clause challenges.

Under the Second Circuit's decision, the validity of flow control turns almost entirely on the identity of the record title owner of the preferred facility. If legal title to a facility is in the name of a private entity, a law requiring that waste be delivered to that facility is subject to the Court's virtually *per se* rule of invalidity. If legal title to a facility is in the name of a public entity—even if constructed and operated by a private entity—the very same law would be evaluated under the more deferential *Pike* test. The effect of the law on interstate commerce is precisely the same, yet the result couldn't be more different.

The Second Circuit's decision, in short, exalts form over substance. In so doing, it deviates markedly from this Court's modern Commerce Clause jurisprudence, which has steadfastly "eschewed formalism" in favor of "a sensitive, case-by-case analysis of purposes and effects." *West Lynn Cream-*

ery, Inc. v. Healy, 512 U.S. 186, 201 (1994). See also *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 373 (1991) ("[w]e seek to avoid formalism and to rely upon a consistent and rational method of inquiry") (internal quotation marks omitted). For example, during the middle part of the twentieth century, the Court drew a distinction between taxes on the privilege of engaging in interstate commerce and taxes on the privilege of using a state's highways, holding the former unconstitutional and the latter permissible. Later, however, the Court renounced this distinction as "a triumph of formalism over substance" (*Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 281 (1977)) that "allowed the validity of statutes to hinge on 'legal terminology,' 'draftsmanship and phraseology'" (*Quill Corp. v. North Dakota*, 504 U.S. 298, 310 (1992) (quoting *Complete Auto*, 430 U.S. at 281)).

The public-private distinction embraced by the Second Circuit is a throwback to the formalism that this Court has renounced. Review is warranted to bring the Second Circuit back in line with what the Court has determined to be the appropriate focus: "whether the [challenged law] produces a forbidden effect" (*Complete Auto*, 430 U.S. at 288).

3. The decision below is in tension with this Court's "market participant" cases.

This Court's "market participant" doctrine provides that the strictures of the dormant Commerce Clause do not apply when a state or local government "is acting as a market participant, rather than as a market regulator." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984) (plurality op.). This doctrine "is not *carte blanche* to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual-privity." *Id.* at 97. To the contrary, the doctrine "allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The

State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market." *Ibid.*[6]

Here, the market-participant doctrine plainly does not immunize respondents' laws requiring that waste collected by private haulers within the boundaries of Oneida and Herkimer Counties be brought to the Authority's facilities for processing and/or disposal. Indeed, the Second Circuit so recognized. See App., *infra*, 36a. Yet in holding that respondents' ownership of the favored facilities renders the flow-control laws non-discriminatory, the Second Circuit has given state and local governments the very *carte blanche* this Court has denied them under the market-participant doctrine. If the Second Circuit's decision is allowed to stand, state and local governments could be emboldened to enter any number of markets and then use their regulatory powers to favor themselves over their private interstate competitors.

Although such self-dealing would not entirely be immunized from scrutiny under the dormant Commerce Clause, the notion that it need only survive the *Pike* balancing test is in significant tension with the Court's strongly expressed concern that the market-participant doctrine not "swallow[] up the rule that States may not impose substantial burdens on

---

[6] It merits mention that, in the case in which the Court first recognized the market-participant doctrine, the Court found it significant that "the commerce affected by the [challenged law] appears to have been created, in whole or in substantial part, by the [overall program of which the challenged law was a part]." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809 n.18 (1976). See also *id.* at 815-816 (Stevens, J., concurring). The present case presents the flip side of this situation: commerce in processing services and recyclables pre-dated respondents' entry into the waste processing business and, by fiat, respondents have arrogated to themselves all of that pre-existing commerce.

interstate commerce even if they act with the permissible state purpose of fostering local industry." *South-Central Timber*, 467 U.S. at 98 (plurality op.).

C. The Issue Presented Is Important And Should Be Resolved Now.

The circuit conflict regarding the constitutionality of flow-control provisions that favor public facilities should be resolved without delay. Since *United Haulers I*, it has been an open question whether other courts would adopt the Second Circuit's reasoning. The Sixth Circuit's decision to reject the Second Circuit's approach has now made it clear that the courts will be divided on this issue until this Court takes up the matter. The Court should do so without delay because having a stable and uniform rule regarding the legality of flow control is essential.

Since *Carbone*, many flow-control provisions have been held unconstitutional.[7] States and local governments across the country, however, nevertheless remain eager to adopt flow control. See Brief Amicus Curiae of the Bristol Resource Recovery Operating Committee, *et al.*, filed in *United Haulers II*, at 2 (group of local governmental entities contend that "flow control is integral to fulfilling" their responsibili-

---

[7] See, *e.g.*, *U & I Sanitation v. City of Columbus*, 205 F.3d 1063 (8th Cir. 2000); *Ben Oehrleins & Sons & Daughter v. Hennepin County*, 115 F.3d 1372, 1384-1385 (8th Cir. 1997); *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995); *Coastal Carting Ltd. v. Broward County*, 75 F. Supp. 2d 1350 (S.D. Fla. 1999); *Zenith/Kremer Waste Sys., Inc. v. Western Lake Superior Sanitary Dist.*, 1996 WL 612465, at *1-*3, *10 n.13 (D. Minn. July 2, 1996); *Southcentral Pa. Waste Haulers Ass'n*, 877 F. Supp. at 943; *Empire Sanitary Landfill, Inc. v. Commonwealth of Pennsylvania*, 684 A.2d 1047, 1056 (Pa. 1996).

ties for solid waste management).[8] If the decision below stands, therefore, it seems clear that many local governments outside the Sixth Circuit that own (or can assume ownership of) waste processing facilities will impose flow control in the hope that the Second Circuit's approach ultimately will become the law of the land. Indeed, some have already done so. See *id.* at Appendix A (several governmental entities appearing as *amici curiae* in *United Haulers II* state that they have adopted flow control since *United Haulers I* was decided); see also *Pine Belt*, 261 F. Supp. 2d at 649-650 (assessing constitutionality of Mississippi flow-control ordinance adopted following *United Haulers I*). In addition, the local governments that have, in an effort to satisfy *Carbone*, exempted from their flow-control laws waste destined for out-of-state disposal may be emboldened to eliminate the exemptions.[9]

Although ordinances directing waste to publicly owned facilities undoubtedly would become commonplace if this Court denies certiorari, it would remain unsettled whether such arrangements are constitutional. Until this Court addresses the matter, each Circuit will, in turn, have to decide

---

[8] As of 1995, at least 39 states and the District of Columbia had authorized localities to impose flow control. See United States Environmental Protection Agency, Report to Congress: *Flow Controls and Municipal Solid Waste* II-1 to II-5 (Mar. 1995)

[9] These provisions generally have been upheld. See, *e.g.*, *IESI AR Corp. v. Northwest Arkansas Regional Solid Waste Mgmt. Dist.*, 433 F.3d 600 (8th Cir. 2006); *On the Green Apartments L.L.C. v. City of Tacoma*, 241 F.3d 1235 (9th Cir. 2001); *Ben Oehrleins*, 115 F.3d at 1385-1387; *Vince Refuse Serv., Inc. v. Clark County Solid Waste Mgmt. Dist.*, 1995 WL 253121 (S.D. Ohio Mar. 7, 1995). But see *Randy's Sanitation, Inc. v. Wright County*, 65 F. Supp. 2d 1017, 1023 (D. Minn. 1999) (intrastate flow-control ordinance unconstitutionally burdened interstate commerce).

whether or not to follow the Second Circuit or the Sixth Circuit, and each decision will only deepen the existing circuit split.[10] In the Second Circuit and in any other jurisdiction that embraces the public-private distinction, public authorities would have no certainty that this Court will not ultimately reject that distinction, putting their entire waste-management schemes in jeopardy. Conversely, in Circuits that reject the public-private distinction and strike down flow-control ordinances under *Carbone*, private businesses would continue to labor under a cloud of uncertainty as to whether, in the end, their contracts will be undermined as a result of a future decision of this Court embracing that distinction. To eliminate this uncertainty and to avoid the unnecessary disruption of public and private expectations, the question presented here should be resolved now.

II. THE SECOND CIRCUIT'S CONSTRUCTION OF *PIKE* CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND OF THIS COURT

A. The Holding That Flow Control To A Government-Owned Facility Imposes Only An "Insubstantial" Burden On Interstate Commerce Conflicts With Decisions Of Other Circuits.

The Second Circuit has repeatedly ruled that a nondiscriminatory regulation need not be put through the *Pike* balancing test unless the putative burden on interstate commerce "is ***qualitatively or quantitatively different from that imposed on intrastate commerce.***" *Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205, 217 (2d Cir. 2004) (citations omitted) (emphasis added). This reading of the *Pike* test was imple-

---

[10] As noted above, this issue was presented to the Fifth Circuit in *Pine Belt*, but it concluded that the plaintiffs lacked standing to contend that the flow-control provision was discriminatory. See note 5, *supra*.

mented here: although the court ostensibly declined to decide whether respondents' flow-control laws impose a cognizable burden on interstate commerce, it held that any such burden is "insubstantial" or "slight" because it does not fall differentially on any particular out-of-state entity.

The Fifth Circuit has applied the Second Circuit's construction of *Pike* to facts nearly identical to those here. In *National Solid Waste Management Ass'n v. Pine Belt Regional Solid Waste Management Authority*, 389 F.3d 491 (5th Cir. 2004), the court evaluated the constitutionality of flow-control ordinances requiring delivery of waste to facilities owned by the regional waste management authority. The court held that the plaintiffs lacked standing to pursue their claim that the ordinances were facially discriminatory (*id.* at 500), but reached the merits of their claim that the regulation excessively burdened interstate commerce (*id.* at 501). The court held that, because the ordinances did not have a "disparate impact on interstate commerce," they "ha[d] not imposed any incidental burdens on interstate commerce" and therefore passed the *Pike* test. *Id.* at 502 (quoting *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys. Inc.*, 155 F.3d 59, 75 (2d Cir. 1998)).

In contrast to the Second and Fifth Circuits, the Fourth, Eighth, Sixth, and Tenth Circuits have applied *Pike* to invalidate evenhanded state laws that impose burdens on interstate commerce that exceed their benefits—even when those laws do ***not*** impose greater burdens on out-of-state interests.

The most analogous case is *U & I Sanitation v. City of Columbus*, 205 F.3d 1063 (8th Cir. 2000). There, the Eighth Circuit addressed a municipal flow-control ordinance that was otherwise very similar to the respondents' flow-control laws, but did not apply to waste "destined for out-of-state disposal." *Id.* at 1065. For this reason, the court of appeals concluded that the ordinance did "***not*** overtly discriminate against interstate commerce on its face, in its purpose, or

through its effects." *Id.* at 1069 (emphasis added). Although there was no suggestion of any "disparate impact" on out-of-state interests, the Eighth Circuit engaged in the balancing analysis mandated by *Pike* and invalidated the challenged ordinance because "the local interests that it serves do not justify the burden that it imposes upon interstate commerce." *Ibid.* The court found that the ordinance did little to advance local interests and that the municipality had alternative means to accomplish its purposes that would impose less of a burden on interstate commerce. See *id.* at 1069-1072. Particularly given the possibility that other localities might adopt similar flow-control restrictions, the court explained that "the ordinance's interference with interstate commerce is 'clearly excessive' in relation to [its] local benefits." *Id.* at 1072; see also *R & M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731, 735, 736 (8th Cir. 2002) (invalidating challenged law under *Pike*, despite absence of evidence that the law had a "discriminatory effect" or "places out-of-state distributors at a competitive disadvantage," because "there is clearly a burden [on interstate commerce] substantial enough to outweigh the *de minimis* putative local benefit of the law").

The Fourth, Sixth, and Tenth Circuits have used a similar analysis in striking down (or reversing district court judgments upholding) state laws even though those laws did not impose a competitive disadvantage on out-of-state commercial interests. See *PSINet, Inc. v. Chapman*, 362 F.3d 227, 240 (4th Cir. 2004) (even if challenged regulation of Internet were construed to reach only in-state web sites or sites having substantial contact with the regulating state, regulation is invalid under *Pike* "because the burdens it imposes on interstate commerce are excessive in relation to the local benefits it confers") (alternative holding);[11] *McNeilus Truck & Mfg.*,

---

[11] See also *Chambers Med. Techs., Inc. v. Bryant*, 52 F.3d 1252, 1261 (4th Cir. 1995) (applying *Pike* test where challenged law

Inc. v. Ohio, 226 F.3d 429, 444 (6th Cir. 2000) (even if statute is deemed to be nondiscriminatory, "the lack of any significant local benefit that does not already exist means that the State * * * could not demonstrate that the benefits of the statute outweigh even an incidental burden on interstate commerce posed by the [challenged law]") (alternative holding); *Blue Circle Cement, Inc. v. Board of County Comm'rs*, 27 F.3d 1499, 1511-1512 (10th Cir. 1994) (agreeing with district court that challenged ordinance "regulates evenhandedly" and "confers no advantages on in-state entities," but reversing and remanding because lower court failed to apply *Pike* test); *A.C.L.U. v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999) (striking down non-discriminatory law under *Pike* balancing test) (alternative holding).

The Tenth Circuit, moreover, has ***expressly*** rejected the notion that "the only inquiry is whether the statute imposes a different burden on interstate commerce." *Dorrance v. McCarthy*, 957 F.2d 761, 764 (10th Cir. 1992). As it explained, that "argument is not only circular, but it completely misstates the *Pike* analysis. By definition, a statute that regulates evenhandedly does not impose a different burden on interstate commerce." *Ibid.*

B. The Decision Below Misconstrues The *Pike* Test.

This Court never has indicated that a "differential" burden on out-of-state entities is any part of the *Pike* test. Quite the contrary: the *Pike* balancing of benefit and burden comes into play only when a state rule "regulates ***even-handedly***" and thus has "only incidental" effects on interstate commerce. *Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982) (quoting *Pike*, 397 U.S. at 142) (emphasis added); see also *Brown-Forman Distillers Corp. v. New York State Liquor*

"regulate[d] evenhandedly and ha[d] only incidental effects on interstate commerce").

Auth., 476 U.S. 573, 579 (1986). When a state law ***does*** have a differential impact on in-state and out-of-state entities, it is deemed to have the "practical effect of * * * discriminating" against interstate commerce, and it is subject, ***not*** to the *Pike* test, but to the rule of virtual *per se* invalidity that governs discriminatory state regulations. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 350-351 (1977); see, *e.g.*, *Am. Trucking Ass'ns. Inc. v. Scheiner*, 483 U.S. 266, 281 (1987) (state tax that has a discriminatory effect will be struck down even if it does "not allocate tax burdens between insiders and outsiders in a manner that is facially discriminatory").

Perhaps the clearest statement of this principle can be found in Justice O'Connor's concurring opinion in *Carbone*. Justice O'Connor concluded that Clarkstown's flow-control ordinance did not discriminate against interstate commerce because it "does not give more favorable treatment to local interests as a group as compared to out-of-state or out-of town economic interests." 511 U.S. at 404. In her view, however, this finding of non-discrimination "[did] not * * * end the Commerce Clause inquiry." *Id.* at 405. As she pointed out, "[e]ven a nondiscriminatory regulation may nonetheless impose an excessive burden on interstate trade when considered in relation to the local benefits conferred." *Ibid.* Undertaking the balancing required under *Pike*, Justice O'Connor concluded that Clarkstown's flow-control ordinance was invalid because the burdens it imposed were excessive in relation to the local interests served by the ordinance. See *ibid.*

Justice O'Connor expressly rejected any notion that the flow-control law satisfied the Commerce Clause merely because it applied equally to in-state and out-of-state businesses, observing that this Court has "long recognized that 'a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to * * * the people of the State enacting such statute.'" *Ibid.* (quoting *Brimmer v. Rebman*, 138 U.S. 78, 83 (1891)).

Even through evenhanded regulation, "'a State consistently with the Commerce Clause cannot put a barrier around its borders to bar out trade from other States and thus bring to naught the great constitutional purpose of the fathers in giving to Congress the power 'To regulate Commerce * * * among the several States.'" *American Trucking Assn's, Inc.*, 483 U.S. at 281 n.12 (quoting *Nippert v. City of Richmond*, 327 U.S. 416, 425-426 (1946)); see also, *e.g.*, *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 445 (1978) (invalidating truck-length regulation because it "impose[s] a substantial burden on the interstate movement of goods"); *Bibb v. Navaho Freight Lines, Inc.*, 359 U.S. 520, 529 (1959) ("state regulations that run afoul of the policy of free trade reflected in the Commerce Clause must * * * bow"); *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 770 (1945) (striking down train-length restriction that "materially restrict[ed] the free flow of commerce across state lines").

Respondents' flow-control laws create just such a "barrier * * * to bar out trade from other States" (*American Trucking Ass'ns, Inc*, 483 U.S. at 281 n.12), yet the court of appeals found the burden on interstate commerce to be "slight" (App., *infra*, 18a). It also failed to consider the impact on the interstate market if other localities were to adopt similar provisions. As Justice O'Connor observed in her concurring opinion in *Carbone*, if that occurs, "the free movement of solid waste in the stream of commerce will be severely impaired. Indeed, pervasive flow control would result in the type of balkanization the [Commerce] Clause is primarily intended to prevent." 511 U.S. at 406. For this reason as well, review is both warranted and necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

EVAN M. TAGER
Counsel of Record
MIRIAM R. NEMETZ
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

APRIL 2006

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2005

(Argued: December 14, 2005 Decided: February 16, 2006)

Docket No. 05-2024-cv

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., AND INGERSOLL PICKUP, INC.,

Plaintiffs-Appellants,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA AND COUNTY OF HERKIMER, NEW YORK,

Defendants-Appellees.

Before: CALABRESI, KATZMANN, and WESLEY, *Circuit Judges.*

Appeal from a decision of the United States District Court for the Northern District of New York (Norman A. Mordue, *Judge*) finding that the municipal flow control ordinances enacted and implemented by Defendants-Appellees do not impose a differential burden on interstate commerce. The district court therefore found that the ordinances do not violate the dormant Commerce Clause and granted the Defendants-Appellees' cross-motion for summary judgment. We conclude that even if we were to recognize that the ordinances burden interstate commerce, we would find that the

burden imposed is not clearly excessive in relation to the local benefits conferred by the ordinances. We therefore decline to resolve the former question. **AFFIRMED**.

APPEARING FOR PLAINTIFFS-APPELLANTS: MIRIAM R. NEMETZ (Evan M. Tager, *on the brief*), Mayer, Brown, Rowe & Maw LLP, Washington, D.C.

APPEARING FOR DEFENDANTS-APPELLEES: MICHAEL J. CAHILL, Germano & Cahill, P.C., Holbrook, N.Y. (Thomas E. Kelly, Horigan, Horigan, Lombardo & Kelly, P.C., Amsterdam, N.Y.; Richard A. Frye, Frye, Foley & Carbone, Utica, N.Y.; Judy Drabicki, Dexter, N.Y., *on the brief*)

APPEARING FOR AMICUS CURIAE STATE OF NEW YORK: CAITLIN J. HALLIGAN, Solicitor General of the State of New York (Daniel Smirlock, Deputy Solicitor General; Julie M. Loughran, Assistant Solicitor General; and John Sipos, Assistant Attorney General, *on the brief*), for Eliot Spitzer, Attorney General of the State of New York, New York, N.Y.

SUBMITTING BRIEF FOR AMICI CURIAE BRISTOL RESOURCE RECOVERY FACILITY OPERATING COMMITTEE; CAPE MAY COUNTY MUNICIPAL UTILITIES AUTHORITY; COUNTY OF ALLEGANY, NEW YORK; DAVIESS COUNTY, KENTUCKY; COUNTY OF MADISON, NEW YORK; FEDERATION OF NEW YORK STATE SOLID WASTE ASSOCIATIONS; MARION COUNTY, OREGON; MID-MAINE WASTE MANAGEMENT CORPORATION; MONTGOMERY COUNTY, OHIO; MONTGOMERY-OTSEGO-SCHOHARIE SOLID WASTE MANAGEMENT AUTHORITY; NEW YORK CHAPTER OF THE SOLID WASTE ASSOCIATION OF NORTH AMERICA; NEW YORK STATE ASSOCIATION FOR REDUCTION, RE-

USE AND RECYCLING; NEW YORK STATE ASSOCIATION FOR SOLID WASTE MANAGEMENT; PINE BELT REGIONAL SOLID WASTE MANAGEMENT AUTHORITY; REGIONAL WASTE SYSTEMS, INC.; SNOHOMISH COUNTY, WASHINGTON; SOLID WASTE AUTHORITY OF CENTRAL OHIO; SOLID WASTE DISPOSAL AUTHORITY OF THE CITY OF HUNTSVILLE, ALABAMA and the YORK COUNTY SOLID WASTE AND REFUSE AUTHORITY: SCOTT M. DUBOFF, Wright & Talisman, P.C., Washington, D.C. (Robert Michalik, Michalik Bauer Silvia & Ciccarillo, New Britain, CT; Daniel Guiney, County Attorney of Allegany County, Belmont, NY; Allen Holbrook, Robert Kirtley, Bryan R. Reynolds, Sullivan Mountjoy Stainback & Miller, Owensboro, KY; Scott Norris, Assistant Legal Counsel, Marion County Office of Legal Counsel, Salem, OR; Nicholas Nazdo, Jensen Baird Gardner & Henry, Portland, ME; Mathias H. Heck, Jr., Montgomery County Prosecuting Attorney, Dayton, OH; Christine M. Chale, Rappaport, Meyers, Whitbeck, Shaw & Rodenhausen, Hudson, NY; Moran M. Pope, III, Pope & Pope, P.A., Hattiesburg, MS; Janice E. Ellis, Prosecuting Attorney, George B. Marsh, Deputy Prosecuting Attorney, Snohomish County, Everett, WA; Harold J. Anderson, Chief Counsel, Solid Waste Authority of Central Ohio, Grove City, OH; Charles H. Younger, Huntsville, AL; Robert M. Strickler, Griffith, Strickler, Lerman & Solymus, York, PA, of counsel)

KATZMANN, *Circuit Judge*:

In this case, we are called upon to decide whether a nondiscriminatory municipal flow control regulation that does not place non-local firms at a competitive disadvantage, regulate extraterritorially, or conflict with the regulatory requirements of any other jurisdiction nonetheless violates the dormant Commerce Clause. The municipal scheme at issue requires that the garbage generated by local households and

businesses be delivered to facilities which are owned and operated by a public corporation, thereby preventing this trash from being processed at non-local facilities. After processing, the trash is then delivered by a private contractor to a designated landfill site, or is reused or recycled. We decline to decide today whether these flow control ordinances impose a cognizable burden on interstate commerce by prohibiting the export of a locally generated article of commerce because we hold that any such burden would not be clearly excessive in relation to the putative local benefits of the flow control scheme. We conclude, therefore, that the challenged local ordinances do not violate the Commerce Clause. Accordingly, we affirm the judgment of the district court.

I. BACKGROUND

In 1995, Plaintiffs-Appellants United Haulers Association, Inc., Transfer Systems, Inc., Bliss Enterprises, Inc., Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial Containers, Inc. and Ingersoll Pickup, Inc., ("plaintiffs") filed this action pursuant to 42 U.S.C. § 1983 in the Northern District of New York. They claim that ordinances regulating the collection, processing, transfer and disposal of solid waste enacted by the Counties of Oneida and Herkimer violate the dormant aspect of the Commerce Clause and seek injunctive relief barring the enforcement of these ordinances, along with damages and attorneys' fees. Plaintiff United Haulers Association, Inc. is a New York not-for-profit corporation comprised of solid waste management companies. Each of the remaining plaintiffs is a New York business entity that was a member of the United Haulers Association operating in Oneida and Herkimer Counties at the time this suit was filed.

Defendants-Appelles County of Oneida and County of Herkimer (collectively, "the Counties") enacted the challenged ordinances in 1990. These flow control regulations collectively require all solid wastes and recyclables generated

within these adjoining upstate New York counties to be delivered to one of several waste processing facilities owned by Defendant-Appellee Oneida-Herkimer Solid Waste Management Authority ("the Authority"), a municipal corporation).[1] *See* Oneida County Local Law No. 1 of 1990 ("Oneida Law"); Herkimer County Local Law No. 1 of 1990 ("Herkimer Law"). The Authority charges a per-ton "tipping" fee for receiving this waste that is significantly higher than the fees charged on the open market elsewhere in New York State.

The Counties have not excluded private commercial entities from other segments of the local market for waste disposal services. On the contrary, the flow control ordinances expressly allow any licensed private entity, whether local or non-local, to collect solid wastes from area businesses and households for delivery to the Authority's processing facilities. Oneida Law § 10; Herkimer Law § 10. Private commercial entities also are involved in removing wastes from the Authority's facilities after processing. Pursuant to its statutory powers, *see* N.Y. Pub. Auth. L. § 2049-ee(8), the Authority periodically selects a private hauler through an open bidding process to transport processed wastes and recyclables from the Authority's facilities for delivery elsewhere. The Authority awards this delivery contract to the entity deemed to be "the most responsive and responsible Respondent demonstrating the requisite experience and skill in the necessary technologies, and proposing a plan that provides the most cost-effective method of disposing of solid waste with maximum protection of human health and the environment." Expert Report of Robert N. Stavins ¶ 11. Plaintiffs

---

[1] We described the enactment and operation of the flow control ordinances in comprehensive detail in *United Haulers Association Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 261 F.3d 245, 248-51 (2d Cir. 2001), and therefore do not duplicate that effort here.

do not contend that in-state firms have any unfair advantage in this bidding process. However, they do note that the Authority's most recent contract has resulted in the shipment of the Counties' waste to a landfill in New York State, and that the Authority is currently in the process of constructing a landfill site to which all of the Counties' landfill-bound processed wastes will be delivered beginning in 2007. *See* Oneida-Herkimer Solid Waste Management Authority, http://www.ohswa.org/landfill/index.html (last visited Feb. 10, 2006). Plaintiffs assert that both of these developments further burden interstate commerce.

Plaintiffs conceded at oral argument that the Counties could create a public monopoly encompassing the entire waste management process, thereby displacing private firms altogether, without violating the Commerce Clause. *See, e.g., USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1293-94 (2d Cir. 1995). They nonetheless assert that, as long as private entities are permitted to collect garbage from customers, they may not be required to deliver that garbage to an in-state facility, whether publicly or privately owned, as this restriction necessarily prevents them from using processing facilities outside the Counties and thus diminishes the interstate trade in waste and waste disposal services.[2]

The Counties' flow control regime already has been the subject of one appeal to this Court. In the first installment, *United Haulers Association Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 261 F.3d 245 (2d Cir. 2001) ("United Haulers I"), we reviewed the district court's grant

---

[2] In *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dept of Natural Res.*, 504 U.S. 353, 359 (1992), the Supreme Court noted that commercial arrangements involving garbage, whether described as "sales of garbage or purchases of transportation and disposal services," constitute commercial transactions in articles of commerce that have an interstate character (quotation marks omitted). We use these descriptions interchangeably throughout.

of summary judgment to the plaintiffs. The district court had found that the Counties' flow control ordinances, like those struck down by the Supreme Court in *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994), discriminate in favor of a single, favored provider, and therefore had examined the ordinances under the heightened standard applied to discriminatory economic regulation. We reversed, holding that because the Counties' flow control ordinances direct solid waste exclusively to facilities owned by the Authority, a public corporation, they do not favor local business interests and therefore are not discriminatory. *United Haulers I*, 261 F.3d at 263. We then remanded the case to the district court for consideration of the ordinances' validity under the more permissive *Pike* balancing test. *See Pike v. Bruce Church, Inc.*, 397 U.S.137, 142 (1970) (stating that "[w]here [a] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."). In doing so, we expressed skepticism about the ultimate merits of plaintiffs' challenge, noting that another panel had stated in dicta that "the local interests that are served by consolidating garbage service in the hands of the town—safety, sanitation, reliable garbage service, cheaper service to residents—would in any event outweigh any arguable burdens placed on interstate commerce." *United Haulers I*, 261 F.3d at 263 (quoting *USA Recycling*, 66 F.3d at 1295).

On remand, the parties conducted extensive discovery and then cross-moved for summary judgment. The district court, aided by the thorough Report and Recommendation of Magistrate Judge David E. Peebles, found that the Counties' flow control ordinances are constitutionally permissible. The district court observed that "the challenged laws do not treat similarly situated in-state and out-of-state business interests differently," and found that they therefore do not impose any

cognizable burden on interstate commerce. Having reached this conclusion, the district court granted the motion for summary judgment jointly filed by the Counties and the Authority without attempting to assess the local benefits that the ordinances create or to weigh these benefits against the burden placed on interstate commerce.

On appeal, plaintiffs concede, as they did below, that the ordinances afford equal treatment to all commercial entities without regard to their location. However, plaintiffs argue that the district court erred in focusing solely on whether the ordinances inflict disparate harm on non-local businesses. They contend that the district court also should have considered whether the ordinances burden interstate commerce by accomplishing directly what the regulatory burdens found suspect by courts in other contexts do indirectly—*i.e.*, prevent goods and services from flowing across internal political boundaries.

In response, the Counties, the Authority, and the State of New York, appearing as *amicus curiae*, reject plaintiffs' contention that the flow control ordinances burden interstate commerce in any cognizable respect, given plaintiffs' concessions that the ordinances do not disparately impact non-local businesses or interfere with the regulatory regimes of other localities or states. In the alternative, they suggest that the environmental and public health benefits attributable to the ordinances far outweigh any incidental burden on interstate commerce that the ordinances might be found to impose.

II. STANDARD OF REVIEW

We review *de novo* a district court's grant of summary judgment in favor of defendants. *Ford v. McGinnis*, 352 F.3d 582, 587 (2d Cir. 2003). In doing so, we focus on whether the district court properly concluded that there was no genuine issue as to any material fact and that the defen-

dants were entitled to judgment as a matter of law, drawing all necessary factual inferences in favor of the plaintiffs. *Id.*

III. DISCUSSION

Plaintiffs' claim fails because even assuming, *arguendo*, that a burden on interstate commerce exists, it is far exceeded by the ordinances' local benefits. That is, even if we were to agree with plaintiffs that the Counties' flow control ordinances impose a cognizable burden on interstate commerce by preventing the waste generated within the Counties from being exported for processing, given the Counties' undoubted power to monopolize the local marketplace in waste disposal services, as well as the Counties' substantial interest in regulating waste disposal, we also would conclude that the Commerce Clause does not require us to invalidate these ordinances.

A.

Where a challenged state or local regulation does not entail "patent discrimination" against interstate commerce, we assess its validity under the *Pike* standard. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Under *Pike*, a challenged regulation will be upheld unless it "places a burden on interstate commerce that is clearly excessive in relation to the putative local benefits." *USA Recycling*, 66 F.3d at 1282 (internal quotation marks omitted). As we have repeatedly emphasized, "[for a state statute to run afoul of the *Pike* standard, the statute, at a minimum, must impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce." *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 109 (2d Cir. 2001) ("*NEMA*") (citing, *inter alia*, *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59, 75 (2d Cir. 1998); *Gary D. Peake Excavating Inc. v. Town Rd. of Hancock*, 93 F.3d 68, 75 (2d Cir. 1996); *N. Y. State Trawlers Assn v. Jorling*, 16 F.3d 1303, 1308 (2d Cir. 1994); *USA Recycling*, 66 F.3d at 1287). To this point, we have recognized

three instances in which a non-discriminatory state or local regulation may impose a differential burden on interstate commerce: (1) when the regulation has a disparate impact on any non-local commercial entity; (2) when the statute regulates commercial activity that takes place wholly beyond the state's borders; and (3) when the challenged statute imposes a regulatory requirement inconsistent with those of other states. *See id.* at 109-10.

As noted above, plaintiffs concede that the challenged ordinances do not confer any economic advantage on any private entity. They likewise have not argued that the ordinances—which apply only to waste generated in Oneida and Herkimer Counties conflict in any respect with the regulatory requirements imposed by any other jurisdiction, or that they regulate conduct occurring outside the Counties. Plaintiffs thus, by their own admission, have failed to allege that the Counties' regulations have any effect that we have previously recognized as imposing a differential burden on interstate commerce. If we limited ourselves to this inquiry, as the district court did, and as the Defendants-Appellees and New York State would have us do, we could swiftly affirm the decision of the district court that the flow control ordinances do not burden interstate commerce in any cognizable way.

B.

Undaunted, plaintiffs correctly note we have never held that the above list of recognized differential burdens is a closed set. *See NEMA*, 272 F.3d at 109-10 (stating that "several types of burdens would qualify as disparate to trigger *Pike* balancing," and identifying regulatory conflicts and extraterritorial effect as two of them) (internal quotation marks omitted). *See also Pac. Nw. Venison Prods. v. Smith*, 20 F.3d 1008, 1015 (9th Cir.1994) (noting the set of cognizable burdens on interstate commerce "include[s]" a lack of uniformity in state laws, extraterritorial regulation, and disparate impact on non-local interests). They therefore propose two

novel ways in which the Counties' ordinances might be seen to burden interstate commerce. First, they contend that interstate commerce is differentially burdened when the Authority arranges for the delivery of the Counties' processed wastes to an in-state disposal site. Second, they suggest that the ordinances burden interstate commerce by creating a public monopoly in the processing of locally generated solid waste, thereby prohibiting private entities from exporting unprocessed trash and recyclables to other states. We address these arguments in turn.

1. The Authority's Delivery Contracts

We easily dispose of plaintiffs' claim that the Counties' exclusive contracts with private commercial entities for the removal and disposal of waste processed at the Authority's facilities impose a burden on interstate commerce because "[w]hen the Authority selects an in-state disposal site for its non-recyclable waste, *ipso facto* interstate transportation of that waste stream ceases during the term of the contract." Br. of Pls.-Appellants 28. This argument fails because it ignores the well-established distinction between a state's actions in regulating commercial activity, which are limited by the dormant Commerce Clause, and its actions as a participant in the marketplace, which are not. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) ("Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.") (footnote omitted).

A governmental entity acts as a market regulator when it employs tools in pursuit of compliance that no private actor could wield, such as the threat of civil fines, criminal fines and incarceration. *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 512 (2d Cir. 1995). If, on the other hand, "the state is buying or selling goods as any private economic actor might, then it is engaging in market participation that by definition

falls outside the scope of activity governed by the dormant Commerce Clause." *USA Recycling*, 66 F.3d at 1281 (quotation marks omitted). Moreover, it is well settled that a state may act as a market participant with respect to one portion of a program while operating as a market regulator in implementing another. Accordingly, "[c]ourts must evaluate separately each challenged activity of the state to determine whether it constitutes participation or regulation." *Id.* at 1283.

It is plain that the Authority participates in the marketplace as any other economic actor would when, after having employed its regulatory powers to compel delivery of the waste generated within the Counties to its processing facilities, it contracts with private parties to deliver its processed wastes to landfill sites that meet its requirements. Indeed, plaintiffs' very complaint is that the Counties' ordinances prevent them from doing business with out-of-state firms that would process and dispose of the waste they collect in much the same way that the Authority does. Because the Authority in entering into such contracts does not employ any uniquely governmental power or regulate any part of the market in which it is not a participant, the outcome of its bidding process simply is not a concern of the Commerce Clause. *Smithtown*, 66 F.3d at 514-17 (holding that a municipality may require a hauler with which it contracts to deliver waste to a particular disposal site).

We likewise reject plaintiffs' claim that interstate commerce will be burdened when, upon the completion of a landfill site operated by the Authority, the Authority directs the Counties' wastes to this local site. Unquestionably, a governmental entity may refrain from selling into the marketplace articles of commerce that lawfully have come into its possession. In doing so, it does not regulate commerce, and thus is not limited by the Commerce Clause. Moreover, even if the Authority ultimately hires private haulers to move the waste from one government-owned facility to another, it

would still enter the market as a participant, not a regulator, and therefore would be free to operate in this vein free of limitations imposed by the Commerce Clause. *See id.*

This distinction between market participation and market regulation also brings into sharp relief the real issue raised by this appeal. Since the Commerce Clause does not restrict the Authority's choices about how to dispose of the trash that it has lawfully collected, the question truly presented is whether the Counties in fact act lawfully in using their governmental powers to gain possession of all locally generated solid waste, or whether they violate the Commerce Clause in doing so.

2. The Export Barrier Effect

The Counties' flow control regulations mandate that all commercial and industrial waste collected by either municipal or private haulers "shall be delivered to the appropriate facility." Oneida Law § 6(a); Herkimer Law § 6(a). The same requirement applies to recyclables. Oneida Law § 6(b); Herkimer Law § 6(b). A person or entity who violates these rules may be subjected to civil or criminal penalties. Oneida Law § 12; Herkimer Law § 13. By requiring all locally generated wastes to be processed at the Authority's facilities, these regulations necessarily prevent this waste from being processed elsewhere, and therefore impose a type of export barrier on the Counties' unprocessed wastes. As to this much, the parties agree. They also agree that the regulations restrict all private entities equally, do not threaten to conflict with the regulations of other jurisdictions, and do not regulate extraterritorial conduct. The question is whether this non-discriminatory regulatory scheme nonetheless imposes a cognizable burden on interstate commerce because it has the direct and clearly intended effect of prohibiting articles of commerce generated within the Counties from crossing intrastate and interstate lines. If we are persuaded that it does, we must augment the list of regulatory effects that we have

viewed as imposing a differential burden on interstate commerce.

The federal courts long have recognized that a primary purpose of the Commerce Clause is to prevent the unitary national economic unit envisioned by the Framers from being disrupted by local tax and regulatory barriers to trade. *See, e.g., Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935) (declaring that "one state in its dealings with another may not place itself in a position of economic isolation"). This conception has found its most famous expression in the oft-quoted words of Justice Jackson, who explained:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949).

In recognition of this intent, the courts have closely examined state and local regulations that prohibit the import or export of traded goods and thereby disadvantage some commercial entities in their competition with others, subjecting these statutes to exacting scrutiny which few have been able to withstand. *See, e.g., Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 367-68 (1992) (invalidating Michigan ordinance preventing private landfill owners from accepting unauthorized solid waste that originated outside the county); *City of Philadelphia*, 437 U.S. at 628 (striking down New Jersey statute barring the importa-

tion of most hazardous wastes from other states); *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951) (invalidating local ordinance prohibiting distributors from selling milk labeled as pasteurized unless it had been treated within five miles of Madison's central square); *Pennsylvania v. West Virginia*, 262 U.S. 553, 599-600 (1923) (invalidating West Virginia statute barring export of natural gas until in-state demand had been satisfied); West v. Kansas Natural Gas Co., 221 U. S. 229, 262 (1911) (striking down Oklahoma statute prohibiting export of natural gas). *But see Maine v. Taylor*, 477 U.S. 131, 151-52 (1986) (upholding Maine ban on the importation of baitfish that was intended to protect local fisheries from the introduction of parasites and nonnative species).

As we held in *United Haulers I*, and as we reaffirm today, the Counties' flow control ordinances do not discriminate against interstate commerce because no private entity, whether local or non-local, has been disadvantaged vis-a-vis any other by the creation of the Authority's monopoly in waste processing. However, that conclusion does not blind us to the fact that the Counties' flow control ordinances have removed the waste generated in Oneida and Herkimer Counties from the national marketplace for waste processing services, a result which traditionally has been thought to implicate a central purpose of the Commerce Clause. Considered against this historical backdrop, there may be some force to plaintiffs' claim that the narrow class of regulations that explicitly create a prohibitory barrier to commerce for the benefit of a governmental entity operating in an area of traditional governmental concern, even if nondiscriminatory, impose some differential burden on interstate commerce which should be examined under the *Pike* test.

On the other hand, that force is blunted considerably by the absence of any suggestion that these ordinances have any practical effect other than to raise the costs of performing waste collection services within the Counties, and thus the prices paid by local consumers of those services. The pur-

ported differential burden does not appear to fall differentially on the shoulders of any identifiable private or governmental entity; rather, it is alleged to affect differentially the indefinite web of commercial transactions that makes up interstate commerce. But, as we have previously explained, while every state and local regulation imposes costs on merchants who do business there, "[t]he focus of our disparate burden analysis is a state's shifting the costs of regulation to other states. Such circumstances raise the risk that state policymakers will not bear the true political costs of their decisions, because those costs will fall in some measure on the residents of other political jurisdictions." *NEMA*, 272 F.3d at 109 (internal citations omitted). The plaintiffs have not suggested that the Counties' ordinances shift the costs of waste disposal regulation to other jurisdictions by virtue of the fact that they create a regulatory barrier to the export of unprocessed trash. Our precedents in this area would thus appear to counsel against the recognition of the rather abstract harm identified by the plaintiffs as a differential burden triggering the need for *Pike* analysis.

We decline to resolve this question today, however. We do so because, as we explain in the following section, we find it readily apparent that, even if we were to endorse the plaintiffs' claim that the Counties' ordinances burden interstate commerce by preventing the Counties' wastes from being processed by non-local facilities, the resulting burden would be substantially outweighed by the ordinances' local benefits.

C. Application of the *Pike* Balancing Test

As noted above, even if we found that the Counties' flow control ordinances impose a cognizable burden on interstate commerce, we then would turn to the ultimate question of whether this burden is one which the Commerce Clause will tolerate. In our view, any arguable burden imposed on interstate commerce by the challenged flow control ordinances,

far from being "clearly excessive" in relation to the local benefits they confer, is modest. The ordinances' benefits, on the other hand, are clear and substantial. We therefore conclude, without deciding whether the ordinances impose any burden on interstate commerce, that the Counties' ordinances do not violate the dormant Commerce Clause.

As we discussed in the previous section, the challenged ordinances arguably burden interstate commerce by prohibiting the export of unprocessed solid waste and recyclables. In deciding what weight to ascribe to this purported burden, we take note of our prior holding that a municipality, consistent with the Commerce Clause, may impose a public monopoly encompassing the activities of waste collection, processing and disposal. *USA Recycling*, 66 F.3d at 1293-94. If a municipal government may *eliminate* the local private market for waste disposal services, we think it necessarily follows that a local government imposes no more than a limited burden on interstate commerce when it creates a partial monopoly with respect to solid waste management here, at the processing stage that has the ancillary effect of diminishing interstate commerce in that same market.

Plaintiffs' argument that economic "balkanization" would result if jurisdictions across the country were to adopt a similar flow control scheme fails for similar reasons. It is unquestionably the case that the interstate market for waste disposal services would suffer if numerous jurisdictions were to impose restrictions like these on private entities that engage in trash collection. But it is difficult to muster much alarm about that result when, for at least one hundred years, this nation has allowed municipalities to exercise the greater power of taking exclusive control of all locally generated solid waste from the moment that it is placed on the curb. *See, e.g., Gardner v. Michigan*, 199 U.S. 325 (1905) and *Cal. Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905).

The absence of any suggestion that the ordinances have a protectionist effect, or that they interfere with the authority of any other jurisdiction to decide whether and how to regulate its own local waste management concerns, also persuades us that any arguable burden imposed on interstate commerce by the ordinances is easily tolerated. While we have presumed for present purposes that the absence of these effects is not determinative of whether the ordinances create *any* cognizable burden, these factors remain critical to our consideration of the *degree* to which they might burden interstate commerce. This is so because we think the courts have safeguarded the ability of commercial goods to cross state lines primarily as a means to protect the right of businesses to compete on an equal footing wherever they choose to operate, *see H.P. Hood & Sons*, 336 U.S. at 539 ("Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation ..."), and of states and municipalities to exercise their police powers without undue interference from the laws of neighboring jurisdictions, *see Healy v. Beer Inst.*, 491 U.S. 324, 336-37 (1989) ("[T]he Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State."). Where neither of these underlying purposes is implicated by a particular legislative enactment, the burden imposed on interstate commerce must be regarded as insubstantial.

Our conclusion that the assumed burden created by the challenged ordinances is slight means that the defendants need to present only a minimal showing of local benefit in order to compel a finding that this burden is not "clearly excessive" to the benefits that the ordinances provide. The Counties' flow control regulations easily clear this hurdle. First, the flow control measures secure the financial viability of the Counties' comprehensive waste management program

by ensuring that sufficient waste (with its attendant "tipping" fees) is delivered to the Authority's facilities. We readily acknowledge that "revenue generation is not a local interest that can justify discrimination against interstate commerce." *Carbone*, 511 U.S. at 393. However, we are not persuaded by the plaintiffs' suggestion that revenue generation likewise is an insufficient justification to support a *non-discriminatory* regulation, given that the Supreme Court has held in other contexts that a rationale which is insufficient to justify a discriminatory law often is capable of supporting a non-discriminatory statute. *Compare Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (striking down poll tax and declining to adopt dissent's suggestion that the poll tax was adequately supported by the State's interest in collecting revenue) with *M.L.B. v. S.L.J.*, 519 U.S. 102, 123 (1996) (noting that a "State's need for revenue to offset costs, in the mine run of cases, satisfies the rationality requirement" in Equal Protection and Due Process analyses). *But see Carbone*, 511 U.S. at 405-06 (O'Connor, J., concurring) (finding financing rationale insufficient under *Pike* where the municipality could have employed other means to raise necessary revenue).[3] Moreover, the flow control requirement allows

---

[3] In light of the plaintiffs' heavy reliance on Justice O'Connor's concurring opinion in *Carbone*, we note that no other Justice joined this opinion or otherwise agreed with Justice O'Connor's analysis. The other five justices who voted to strike down the ordinance did so on the basis that the town's ordinance discriminated against interstate commerce. *Carbone*, 511 U.S. at 391-92. Justice O'Connor disagreed that the discrimination test was applicable, but thought that the flow control measures failed the *Pike* test because the burden placed on interstate commerce was excessive. *Id.* at 405-07. The three dissenting justices also disagreed with the majority's assessment, but, unlike Justice O'Connor, opined that the benefits of the ordinances outweighed any incidental burden on interstate commerce. *Id.* at 423-30. (Souter, J., dissenting). In particular, the dissenters emphasized that "[p]rotection of the pub-

the Counties to distribute the costs associated with operating its waste management system in a manner commensurate with the extent that local individuals and businesses place demands on those facilities, and to do so in an administratively convenient way.

The record also demonstrates that financing is not the sole purpose of the flow control ordinances. Rather, the flow control measures substantially facilitate the Counties' goal of establishing a comprehensive waste management system that encourages waste volume reduction, recycling, and reuse and ensures the proper disposal of hazardous wastes, thereby reducing the Counties' exposure to costly environmental tort suits. *See B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192,1198 (2d Cir. 1992) (holding that "a municipality may be liable as a potentially responsible party if it arranges for the disposal of hazardous substances"). Requiring that all solid waste be delivered to an appropriate processing facility allows the Authority to pursue these goals by establishing differential pricing for different categories of waste, assessing fines for noncompliance, and directing the region's trash to landfill facilities that employ acceptable environmental practices. We agree with plaintiffs that some of these goals, particularly those relating to revenue generation, also might be achieved through other instruments of municipal policy. However, nothing in the record before us demonstrates, or even suggests, that the Counties could address their liability concerns or encourage recycling across the wide range of waste products accepted by the Authority's recycling program in any other way, let alone through an approach as straightforward as the use of flow control.

In our view, then, the local benefits of the flow control measures substantially outweigh whatever modest differen-

---

lic fisc is a legitimate local benefit directly advanced by the ordinance." *Id.* at 429.

tial burden they may place on interstate commerce. Because the *Pike* test places the onus on the plaintiffs to show that this burden is clearly excessive in relation to these benefits, we easily find that the Counties' flow control ordinances do not violate the dormant Commerce Clause, and therefore do not decide whether the ordinances burden interstate commerce at all.

IV. CONCLUSION

We have considered all of plaintiffs' other arguments and find them to be without merit. For the reasons set forth above, the district court correctly granted summary judgment to the Defendants-Appellees. Accordingly, the judgment of the district court is hereby **AFFIRMED**.

APPENDIX B

United States Court of Appeals,
Second Circuit.

UNITED HAULERS ASSOCIATION, INC., Transfer Systems Inc., Bliss Enterprises, Inc., Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial Containers, Inc. and Ingersoll Pickup Inc., Plaintiffs-Appellees,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, County of Oneida and County of Herkimer, Defendants-Appellants.

Docket Nos. 00-7593, 00-7595 and 00-7597.

Argued Dec. 19, 2000.
Decided July 27, 2001.

Before: MESKILL, LEVAL and CALABRESI, Circuit Judges.

MESKILL, Circuit Judge:

Defendants-appellants Oneida-Herkimer Solid Waste Management Authority (Authority) and the Counties of Oneida and Herkimer (Counties) appeal a March 31, 2000 order of the United States District Court for the Northern District of New York, Pooler, *Circuit Judge* sitting by designation, granting summary judgment in favor of plaintiffs-appellees United Haulers Association, Inc., Transfer Systems, Inc., Bliss Enterprises, Inc., Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial Containers, Inc. and Ingersoll Pickup, Inc. (collectively "United Haulers") with respect to defendants' liability under 42 U.S.C. § 1983;

enjoining the enforcement of the Counties' solid waste laws and declaring those laws unconstitutional under the Commerce Clause.

We must decide whether the Counties' so-called "flow control" ordinances, which require that all waste generated within the Counties be delivered to one of five publicly owned facilities, are unconstitutional under the Commerce Clause. The district court found the flow control laws "virtually indistinguishable from the laws examined and struck down" in *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994) (*Carbone*), and *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), and, therefore, held that the ordinances were unconstitutional.

We hold that because the favored facilities are publicly owned, the ordinances do not discriminate against interstate commerce, and therefore are not subject to the rigorous test set forth in *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986). We remand to the district court to consider whether the ordinances impose burdens on interstate commerce that are clearly excessive in relation to the local benefits. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

BACKGROUND

The history of local solid waste regulation in the State of New York and across the country has been well documented. *See, e.g., Inc. Vill. of Rockville Ctr. v. Town of Hempstead*, 196 F.3d 395, 396-98 (2d Cir. 1999); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 791-92 (3d Cir. 1995). Thus, we only briefly discuss the events that prompted the Counties to implement their waste management scheme.

Historically, each city, town or village within the Counties was responsible for its own waste management. This balkanization led to the proliferation of waste dumps of all sizes, and with varying degrees of environmental account-

ability. The environmental risks and liabilities became apparent in the 1980s when over 600 local businesses and several local municipalities and school districts were named as third-party defendants in a federal environmental clean-up action against the Ludlow Landfill in Oneida County. *See generally* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675.

This "solid waste crisis," as Oneida County describes it, and the increased environmental risks and exposure to federal and state liability which flowed from it, prompted the Counties to seek a solution. Like many of their municipal neighbors in New York and throughout the country, the Counties devised a comprehensive waste management system in an attempt to provide for the safe and cost-effective disposal of their residents' solid waste. Like many of their municipal neighbors, the Counties' plan is now the subject of a constitutional challenge.

A. The Counties' Solid Waste Management Solution

Oneida and Herkimer Counties are located in central New York, in the Mohawk Valley, and together encompass over 2,600 square miles with a combined population of approximately 306,000 persons, residing in 78 different cities, towns and villages. Both Counties are municipal corporations of the State of New York, and together constitute a single "planning unit" under the New York State Solid Waste Management Plan and its authorizing legislation. *See* N.Y. Envtl. Conserv. L. § 27-0107(1)(a).

In late 1987, the Counties entered into a municipal contract for the purpose of coordinating and consolidating the management of their solid waste. To that end, they hired a consulting firm to prepare an environmental statement and solid waste management plan. The statement and plan contemplate the construction of six facilities collectively to manage the Counties' solid waste: a recycling center, a compost facility, a transfer station, a waste-to-energy plant, an ash

landfill and a C & D (construction and demolition) debris landfill. The estimated cost of these facilities was $155-200 million.

The Counties requested that then-Governor Cuomo and the New York State Legislative Commission on Solid Waste Management (Commission) create a waste management authority to assume the Counties' joint waste management responsibilities. The Governor and Commission complied by creating the Authority, a public benefit corporation authorized by the Oneida-Herkimer Solid Waste Management Authority Act of 1988(Act). *See generally* N.Y. Pub. Auth. L. § 2049-aa. The Authority has the power, among other things, to collect, process and dispose of solid waste generated in the Counties. Moreover, the Act permits the Counties to contract with the Authority to obligate the Counties to ensure the continued operation and solvency of the Authority. *See id.* at §§ 2049-ee and tt. As amended in 1990, the Act prohibits the Authority from accepting solid waste (other than recyclable material) from outside of the Counties. *See id.* at §§ 2049-ee(4) and (7).

1. Agreements Between the Counties and the Authority

On May 10, 1989, the Authority and the Counties entered into a Solid Waste Management Agreement, in which the Authority agreed to manage and dispose of all solid waste within the Counties. In particular, the Authority agreed to take control of the operation of the Oneida County Energy Recovery Facility and the Oneida-Herkimer Recycling Center (Recycling Center) beginning on January 1, 1990, and to collect "tipping fees" sufficient to pay its operating and maintenance costs. *See SSC Corp.*, 66 F.3d at 505 n.5 (describing "tipping fee" as an industry term for a disposal charge or gate fee). The Authority assumed the Counties' regulatory powers with regard to private haulers operating within the Counties. For their part, the Counties agreed to

direct all recyclables to the Recycling Center and agreed to direct all solid waste generated in the Counties to facilities designated by the Authority.

On December 28, 1989, the Authority and the Counties entered into a second solid waste management agreement. In that agreement, the Authority reaffirmed its obligations under the first agreement and the Counties agreed to pay the Authority's operating costs and debt service to the extent those costs were not recouped through tipping fees and other disposal related charges.

2. The Local Laws

In December 1989, the Oneida County Board of Legislators enacted Local Law No. 1 of 1990, Oneida's flow control law. The law requires that all solid waste generated within the County be picked up by the municipality, a licensed private hauler or the generator, and delivered to certain approved processing sites designated by the Authority.[1] Accordingly, private haulers must obtain a permit from the Authority to pick up solid waste in the Counties. Failure to deliver that waste to the designated facilities subjects the private hauler to revocation of its permit, fines and imprisonment.

Two months later, in February 1990, the Herkimer County Legislature enacted Herkimer County Local Law No.

---

[1] Section 2(a) of the Oneida Local Law provides:

> In order to provide for public health and safety and to facilitate the conservation of vital resources: Each person shall provide for the removal of solid waste and recyclables from the property on which they are generated either through a service provided by a municipality or licensed private hauler or by direct haul by the individual generator *to a disposal location approved by the County*.

(emphasis added).

1 of 1990, Herkimer's flow control law, which is substantially similar to the Oneida flow control law.[2]

3. Authority Activities

Between 1990 and 1992 the Authority issued over $51 million in bonds to finance the designated facilities, to construct the Green Waste Compost Facility and the Utica Transfer Station, and to refinance prior bonds. The Authority owns all five designated facilities and operates all but the Utica Transfer Station.

a. *Utica Transfer Station Operating Agreement*

In 1991, the Authority accepted bids for the operation of the Utica Transfer Station. The bidding process was open to all private waste disposal companies, in-state and out-of-state. The Authority received four bids, all from out-of-state businesses, which proposed delivery of the solid waste at the transfer station to eight landfills, seven of which were located outside of New York.

In June 1991, the Authority entered into a contract with Empire Sanitary Landfill, Inc. (Empire) to operate the Utica Transfer Station. Pursuant to that contract, Empire transported all solid waste processed at the transfer station to Empire's landfill in Taylor, Pennsylvania for disposal. The

---

[2] Section 2(c) of the Herkimer Local Law provides:

> After placement of garbage and of recyclable materials at the roadside or other designated area approved by the Legislature by a person for collection in accordance herewith, such garbage and recyclable material *shall be delivered to the appropriate facility designated by the Legislature, or by the Authority pursuant to contract with the County.*

(emphasis added).

Authority agreed to deliver or cause to be delivered all solid waste generated or originating in the Counties (other than recyclables and waste burned at the Energy Recovery Facility) to the transfer station. The parties extended the contract to span the period 1995 to 1998.

In 1998, the Authority again accepted bids from private waste disposal companies. This time, Waste Management of New York (Waste Management), a Delaware limited liability company, prevailed. Waste Management agreed to dispose of the waste processed at the transfer station at two facilities, one located in-state and the other located in Erie, Pennsylvania. Waste Management continues to operate the transfer station on behalf of the Counties.

In the May 20, 1991 Final Local Solid Waste Management System Plan for the Counties, the Authority contemplates the development of additional facilities "to provide for *all* components of the waste stream for all residents of the two counties" (emphasis added). The Authority expressly states in the Plan that it "is wholly committed to the development of facilities within Oneida and Herkimer Counties to provide for the region's long-term needs." In other words, the current out-sourcing of the transfer station's operation is a temporary measure until the Authority brings into operation a County landfill, the last of the six facilities contemplated in the original environmental plan, and is otherwise able to meet all of the Counties' solid waste management needs.

b. *The Authority's Rules and Regulations*

Pursuant to the May and December 1989 agreements and the local flow control laws enacted by the Counties, the Authority has promulgated rules and regulations. The Authority's 1995 Rules and Regulations provide that private haulers "must deliver all acceptable solid waste and curbside collected recyclables generated within Oneida and Herkimer Counties to an Authority designated facility." The 1995 Rules and Regulations also require all private haulers to ob-

tain a Solid Waste Collection and Disposal Permit from the Authority. The Authority sets the applicable tipping fees, designates access route patterns to four of the five designated facilities and retains the right to redirect "solid waste ... to the appropriate facility according to waste production, waste origin, waste type, seasonal fluctuations or planned operating procedures." To enforce the Counties' local laws and the 1995 Rules and Regulations, the Authority employs "garbage cops" (as coined by United Haulers) to monitor private haulers' activities and ensure compliance with the flow control ordinances.

B. Alleged Effect on Private Haulers

The individual plaintiff haulers are four New York corporations and two New York sole proprietorships, each of which engaged in the collection, transport, processing and disposal of solid waste within the Counties. United Haulers Association, Inc. (Association) is a not-for-profit New York corporation comprised of solid waste management companies doing business within the Counties. Each of the individual plaintiffs is a member of the Association.

Under the 1995 Rules and Regulations, private haulers must pay the Authority a tipping fee of at least $86 per ton of solid waste disposed of at the Authority's facilities. If witnessed disposal is required or if the load contains more than 25% recyclables, the charge is increased to as much as $172 per ton. Even the lowest tipping fee charged under the Counties' scheme is higher than the market value for the disposal services the Authority provides. But for the Counties' flow control laws, United Haulers claims that it could deliver and dispose of solid waste at other facilities within the State of New York or in other states at a lower price. United Haulers submitted affidavits from Jeff Bliss, President of Bliss Enterprises, Inc. and David N. Levitt, Vice President of Levitt's Commercial Containers, Inc., averring that out-of-state disposal facilities accessible to the haulers charged significantly

lower tipping fees. For example, United Haulers claims that Greentree Landfill in Pennsylvania is capable of accepting municipal waste from the haulers at a tipping fee of $26-30 per ton. Therefore, according to United Haulers, the Counties' flow control laws bar them from accessing a viable, and significantly cheaper, interstate market for waste disposal.

C. District Court Proceedings

On April 14, 1995, United Haulers commenced the present action against the Counties and the Authority alleging that the flow control laws are unconstitutional and constitute a deprivation of United Haulers' constitutional rights. *See* 42 U.S.C. § 1983.

Soon thereafter, United Haulers moved for summary judgment, seeking an order (1) declaring that the flow control laws unconstitutionally discriminate and/or unduly burden interstate commerce in violation of the Commerce Clause, (2) enjoining the Authority and the Counties from enforcing the flow control laws, (3) declaring that the Counties and the Authority deprived United Haulers of rights, privileges or immunities secured by the Constitution, and (4) holding the Counties and the Authority liable for damages and attorney's fees under 42 U.S.C. § 1988.

United Haulers argued, as it does now, that "the recent and controlling decision by the United States Supreme Court in *C & A Carbone, Inc. v. Town of Clarkstown* establishes the unconstitutionality of the Flow Control Laws." *United Haulers* asserted that, like the laws stricken in *Carbone*, the Counties' flow control laws discriminate against interstate commerce to finance the Counties' solid waste management scheme. United Haulers pointed out that the flow control laws in this case are designed to support a much larger waste management system (almost 50 times more expensive) than that in *Carbone* and impact approximately three times more solid waste than in *Carbone*.

In opposition, the Counties and the Authority argued that they had adopted "an integrated system of solid waste disposal" to alleviate "important public health and environmental concerns" caused by the hodge-podge system of private enterprise and sub-standard disposal sites. They argued that the waste management system did not discriminate against or unduly burden interstate commerce under *Carbone*. Alternatively, they argued that they were entitled to further discovery pursuant to Fed.R.Civ.P. 56(e) and (f) to enable them to show that there were no alternative means to accomplish their legitimate goals. In their view, anything less than full discovery would "reward[ ] plaintiffs for their guerilla litigation strategy and punish[ ] the [defendants] in contravention of the intent and spirit of the Federal Rules of Civil Procedure."

Shortly after United Haulers moved for summary judgment, the Counties and the Authority answered the Complaint and served an initial set of interrogatories. At a June 1, 1995 scheduling conference, however, United Haulers requested a protective order staying discovery pending resolution of its motion. The magistrate judge granted the protective order suspending discovery. Accordingly, no discovery took place prior to the district court's determination of United Haulers' summary judgment motion that is the subject of this appeal.

The district court heard oral argument on United Hauler's motion for summary judgment in October 1995. Almost five years later, on March 31, 2000, the district court entered an order granting United Haulers' motion. The district court declared the flow control laws unconstitutional and enjoined the Counties and the Authority from enforcing them. After concluding that the Association did not have standing to assert a section 1983 damages claim, the district court granted summary judgment in favor of the individual haulers on that claim and referred the action to a magistrate judge for calculation of damages.

The Counties and the Authority filed timely notices of appeal on April 28, 2000. We heard argument on December 19, 2000, and following argument solicited supplemental briefing from the parties on several issues. We now reverse and remand.

DISCUSSION

In 1996, we remarked that the federal docket was "clogged with—of all things—garbage." *SSC Corp.*, 66 F.3d at 505. It remains so today. *See, e.g., Maharg, Inc. v. Van Wert Solid Waste Mgmt. Dist.*, 249 F.3d 544 (6th Cir. 2001); *On the Green Apartments L.L.C. v. City of Tacoma*, 241 F.3d 1235 (9th Cir. 2001); *see generally* Stanley E. Cox, *Garbage In, Garbage Out: Court Confusion about the Dormant Commerce Clause*, 50 Okla. L.Rev. 155, 156 (1997) (noting that garbage cases lie "on the cutting edge of dormant Commerce Clause theory").

Although the Supreme Court's and this Court's recent spotlight on local, solid waste regulation provides us with a framework within which to analyze this challenge, many questions remain unanswered with respect to the constitutionality of municipal flow control laws. *See generally* Colin A. Fieman, *The Second Circuit Upholds Waste Management Systems in the Wake of* Carbone *v.* Clarkstown: *The Decisions in* USA Recycling, Inc. *v.* Town of Babylon *and* SSC Corp. *v.* Smithtown, 23 Fordham Urb. L.J. 767, 769 (1996) ("[A]lthough the Second Circuit has made considerable progress in clarifying the law in this area, it has left questions about the constitutionality of flow control unanswered."). Unfortunately, these missing pieces to the constitutional puzzle often force states and municipalities to engage in guesswork about the constitutionality of proposed solid waste management schemes, which are expensive and time-consuming to implement. *See generally, e.g.*, Jennifer M. Anglim, *Note, The Need for a Rational State and Local Response to* Carbone: *Alternate Means to Responsible, Afford-*

able Municipal Solid Waste Management, 18 Va. Envtl. L.J. 129, 130-32 (1999) ("[T]he federal municipal solid waste ... management jurisprudence has followed intertwined and often-conflicting legal theories and precedents, making it difficult for states and municipalities to plan."). With frequent reference to the guiding principles underlying the Supreme Court's dormant Commerce Clause jurisprudence, we attempt to fill in one more piece of this puzzle.

A. Legal Background

The Commerce Clause states that "Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. On its face, the clause does not speak to the power, if any, of the states to regulate interstate commerce. Although the Supremacy Clause prohibits state regulation of interstate commerce in areas where Congress has spoken, *see* U.S. Const. art. VI, cl. 2, neither the text of the Commerce Clause nor the Supremacy Clause "say what the states may or may not do in the absence of congressional action." *Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 749, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978) ("The Commerce Clause does not state a prohibition; it merely grants specific power to Congress. The prohibitive effect of the Clause on state legislation results from the Supremacy Clause and the decisions of this Court."). That question did not remain open for long.

In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824), Justice Johnson sowed the seeds for the "dormant" or "negative" Commerce Clause by arguing that the power to regulate interstate commerce could not rest with two sovereigns. *See id.* at 227 (Johnson, J., concurring) (arguing that "since the power to prescribe the limits to ... freedom [of commerce], necessarily implies the power to determine what shall remain unrestrained, it follows, that the power must be exclusive"); *see also id.* at 209 (Daniel Webster, as counsel,

arguing that the Commerce Clause's affirmative grant to Congress "necessarily" prohibits local action that alters "what the regulating power designs to leave untouched"). In the years that followed, the Supreme Court consistently held that the Commerce Clause's affirmative grant of power to the federal government requires some concomitant limitation on the power of the several states. *See* Boris I. Bittker, *Regulation of Interstate and Foreign Commerce* § 6.01[A] (1999 & Supp. 2001); *see also SSC Corp.*, 66 F.3d at 509 (noting that "federal courts have for more than 150 years invoked the Commerce Clause to scrutinize state regulations affecting interstate commerce").

Justice Jackson later expressed the rationale underlying the judicially created dormant Commerce Clause:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them.

H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 539, 69 S.Ct. 657, 93 L.Ed. 865 (1949); *see Carbone*, 511 U.S. at 390, 114 S.Ct. 1677 ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent."). Justice Jackson's "national market" has led to "material success ... the most impressive in the history of commerce." *H.P. Hood & Sons*, 336 U.S. at 538, 69 S.Ct. 657, arguably because the Supreme Court "consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state." *Id.* at 535, 69 S.Ct. 657. *But see* Edmund W. Kitch, *Regulation, the American Common Market and Public Choice*, 6 Harv. J.L.

& Pub. Pol'y 119, 123-24 (1982) (challenging the practical efficiency resulting from the Court's dormant Commerce Clause jurisprudence).

Not surprisingly, the Court's effort to preserve a national market has, on numerous occasions, come into conflict with the states' traditional power to "legislat[e] on all subjects relating to the health, life, and safety of their citizens." *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960). On these occasions, the Supreme Court has "struggled (to put it nicely) to develop a set of rules by which we may preserve a national market without needlessly intruding upon the States' police powers, each exercise of which no doubt has some effect on the commerce of the Nation." *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 596, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997) (Scalia, J., dissenting) (citing *Okla. Tax Comm'n v. Jefferson Lines*, 514 U.S. 175, 180-83, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995)); *see generally* Boris I. Bittker, *Regulation of Interstate and Foreign Commerce* § 6.01[A], at 6-5 ("[T]he boundaries of the [State's] off-limits area are, and always have been, enveloped in a haze."). Those rules are "simply stated, if not simply applied." *Camps Newfound/Owatonna*, 520 U.S. at 596, 117 S.Ct. 1590 (Scalia, J., dissenting).

B. Dormant Commerce Clause Analysis

As a threshold matter, a court must determine whether a state or local government is "regulating" and, if so, whether that regulation affects interstate commerce. *See Carbone*, 511 U.S. at 389, 114 S.Ct. 1677; *On the Green Apartments L.L.C.*, 241 F.3d at 1241-42.

The dormant Commerce Clause restricts certain state regulation of interstate commerce. It does not prohibit a state from participating in the free market if it acts like a private enterprise. *See, e.g., Reeves, Inc. v. Stake*, 447 U.S. 429, 437, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980) ("There is no indica-

tion of a constitutional plan to limit the ability of the States themselves to operate freely in the free market."); *Sal Tinnerello & Sons v. Town of Stonington*, 141 F.3d 46, 55 (2d Cir. 1998). In general, a state regulates when it exercises governmental powers that are unavailable to private parties. *See SSC Corp.*, 66 F.3d at 512. Classic hallmarks of government regulation include the threatened imposition of fines and/or jail terms to compel behavior. *See id.* The Counties' flow control laws require private haulers to obtain a permit from the Counties and to deliver all waste to Authority-designated facilities. Failure to do either exposes the private hauler to fines, revocation of its permit to pick up solid waste, and imprisonment. Therefore, the Counties have "avail[ed themselves] of the unique powers or special leverage [they] enjoy[] by virtue of [their] status as sovereign[s]," *Inc. Vill. of Rockville Ctr.*, 196 F.3d at 399, and, thus, are regulating the market for waste collection and disposal.

The Supreme Court has left no doubt that flow control regulation affects interstate commerce. In *Carbone*, the Supreme Court stated that "[w]hile the immediate effect of the ordinance is to direct local transport of solid waste to a designated site within the local jurisdiction, its economic effects are interstate in reach." 511 U.S. at 389, 114 S.Ct. 1677. Although the Clarkstown ordinance differs from the Counties' laws in that it applied to solid waste originating outside of Clarkstown, the Court also noted that "even as to waste originant in Clarkstown, the ordinance prevents everyone except the favored local operator from performing the initial processing step." *Id.*; *see On the Green Apartments L.L.C.*, 241 F.3d at 1241 ("While Tacoma's ordinance does not require that the local transportation of out-of-state waste be deposited at a site in the city, it does prevent waste from within the city from being deposited outside of the city."). As such, the Counties' flow control laws sufficiently affect interstate commerce to trigger a deeper dormant Commerce Clause review. As in *Carbone*, "[t]he real question is whether the

flow control ordinance[s][are] valid despite [their] undoubted effect on interstate commerce." 511 U.S. at 389, 114 S.Ct. 1677.

1. Discrimination or Incidental Effects

Once a court determines that a state regulation affects interstate commerce, it must next determine whether the regulation "discriminates against interstate commerce" or regulates even-handedly with incidental effects on interstate commerce. *Id.* at 390, 114 S.Ct. 1677 (internal quotation marks and citations omitted); *see also Gary D. Peake Excavating v. Town Bd. of Hancock*, 93 F.3d 68, 73 (2d Cir. 1996) ("The Supreme Court has established a two-step approach to determine whether a state or municipal law violates the dormant Commerce Clause.").

A local law is discriminatory if it provides for "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *USA Recycling v. Town of Babylon*, 66 F.3d 1272, 1281 (2d Cir. 1995) (quotation marks omitted); *see also Sal Tinnerello & Sons*, 141 F.3d at 55. Where a plaintiff shows that a regulation is discriminatory, the burden shifts to the state or local government to demonstrate that the local benefits outweigh the discriminatory effects and that no nondiscriminatory alternative exists to effectuate the local goals. *See USA Recycling*, 66 F.3d at 1281-82. A discriminatory state or local regulation is virtually *per se* unconstitutional because of "the virtual certainty that such laws, at least in their discriminatory aspect, serve no legitimate, non-protectionist purpose." *Carbone*, 511 U.S. at 422, 114 S.Ct. 1677 (Souter, J., dissenting); *see Gary D. Peake Excavating*, 93 F.3d at 74. In the rare case where a court finds the local interest compelling and the alternatives non-existent, it must uphold the challenged regulation. *See, e.g., Taylor*, 477 U.S. at 151, 106 S.Ct. 2440 ("Maine's ban on the importation of live baitfish serves le-

gitimate purposes that could not adequately be served by available nondiscriminatory alternatives.").

On the other hand, "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142, 90 S.Ct. 844; *Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994). Because this burden is far less demanding than the burden under *Maine v. Taylor*, the critical inquiry is often "whether [the local law] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978).

The district court held that the Counties' flow control laws discriminated against interstate commerce in favor of the Authority's designated facilities and that, in light of *Carbone*, the Counties could not, as a matter of law, demonstrate that no alternatives existed. The district court relied on its belief that "[c]ourts have considered it almost a foregone conclusion that flow control laws violate the dormant commerce clause." (citing *Sal Tinnerello & Sons*, 141 F.3d at 56; *Inc. Vill. of Rockville Ctr.*, 196 F.3d at 397). Accordingly, the district court did not reach the second line of inquiry, *i.e.*, whether "the burden imposed [by the regulations] on [interstate] commerce [was] clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142, 90 S.Ct. 844. We review the district court's determination on summary judgment *de novo*, applying the same legal standard as that used by the district court. *See Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 91 (2d Cir. 2001). We disagree with the district court on several grounds.

First, the district court erroneously attributed to the Supreme Court a *per se* prohibition against flow control laws. *See Harvey & Harvey*, 68 F.3d at 798 ("That [an] ordinance requires the use of [a] selected facility, thus prohibiting the use of non-designated facilities (which may be out of state), does not itself establish a Commerce Clause violation."); *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 188 (1st Cir. 1999) ("We do not interpret *Clarkstown* as explicating a broad-based ban on every flow-control ordinance that happens to be coupled with an exclusive contractual arrangement in favor of an in-state operator."). Unfortunately, the district court's misconception led it to deny the Counties' discovery and essentially grant summary judgment without reference to the unique facts of this case.[3] The Counties' flow control laws, like any other challenged ordinance, must be analyzed under the principles articulated in *Carbone* according to their unique facts. Second, and more importantly, the district court erred in its Commerce Clause analysis by failing to recognize the distinction between private and public ownership of the favored facility.

---

[3] In doing so, the district court also effectively foreclosed the Counties' ability to show that they had no reasonable alternatives to implementing flow control laws. Although *Maine v. Taylor* is the only example of a state meeting the strict burden imposed on a discriminatory regulation, district courts should allow localities an opportunity to make that showing. *See, e.g., Southcentral Pa. Waste Haulers Ass'n v. Bedford-Fulton-Huntingdon Solid Waste Auth.*, 877 F.Supp. 935, 944 (M.D.Pa. 1994) (denying plaintiffs' motion for summary judgment because the defendants' claim that there were no alternatives "raises a disputed issue of material fact"). Such an opportunity may require discovery into, and an examination of, the specific alternatives, if any, available to the locality, based on its unique geographical, practical and historical characteristics.

The following discussion focuses on the latter of these errors and concludes that a municipal flow control law does not discriminate against out-of-state interests in violation of the Commerce Clause when it directs all waste to publicly owned facilities. As such, the district court should have analyzed the Counties' flow control laws under the *Pike* test to determine whether the laws' effects on interstate commerce substantially outweigh the local benefits.

2. Private Ownership vs. Public Ownership

The Counties' waste management scheme creates a bottleneck. Within the bottle, private waste haulers compete for the opportunity to collect solid waste from individual and corporate generators located within the Counties. Once collected, the private waste haulers must deliver the waste to one of five designated, Authority-owned processing facilities located within the Counties, the "bottleneck." For the time being, once the waste has been delivered, private waste disposal companies, both in-state and out-of-state, stand outside the bottle to bid, on an open and competitive basis, for the right to process and ultimately dispose of the waste delivered to the Counties' transfer station. The parties do not dispute, in any relevant respect, how the Counties' system is organized, but instead disagree about whether the flow control restrictions on private haulers, those within the bottle, are discriminatory under the Commerce Clause.

The Counties and the Authority urge us to analyze the flow control ordinances as part of their overall waste management scheme. Specifically, they argue that the bidding process for the operation of the Utica Transfer Station negates any alleged hoarding of the disposal service because it opens the local disposal market to out-of-state bidders. *See, e.g., Harvey & Harvey*, 68 F.3d at 801-02 (holding that selecting a favored facility or business with an open and fair bidding process that permits out-of-state competition comports with the dormant Commerce Clause). The district

court, however, did not reach this aspect of the Counties' system. Furthermore, in several post-*Carbone* decisions, we severed our analysis of flow control ordinances from other aspects of a municipal waste management plan. *See, e.g., Inc. Vill. of Rockville Ctr.*, 196 F.3d at 398-99; *SSC Corp.*, 66 F.3d at 512-13; *see also Huish Detergents v. Warren County*, 214 F.3d 707, 715 (6th Cir. 2000). We do so here as well.

a. *Carbone*

Our analysis naturally begins with *Carbone*, the Supreme Court's only occasion thus far to apply the Commerce Clause to a flow control ordinance. The Supreme Court was presented with the following setting.

The Town of Clarkstown, New York agreed with environmental authorities to close its landfill and build a solid waste transfer station. *See Carbone*, 511 U.S. at 387, 114 S.Ct. 1677. "A local private contractor agreed to construct the facility," which the local contractor would own and operate for a period of five years. *Id.* The town thereafter agreed to buy the station back for one dollar. *Id.* To make the endeavor worthwhile, the contractor charged a set tipping fee for each ton of solid waste disposed of at the transfer station. The town guaranteed the transfer station a minimum yearly waste flow, which was intended to generate tipping fees sufficient to finance the cost of the facility. *See id.* at 412, 114 S.Ct. 1677. To meet the minimum tonnage guarantee, the town enacted a flow control ordinance that required all waste within the town to be delivered to the transfer station. *Id.* The purpose of the ordinance was to "finance [the] new facility with the income generated by the tipping fees." *Id.*

Clarkstown's ordinance differs from the Counties' ordinances in two significant respects. First, the Clarkstown ordinance applied to all solid waste within the town, whether that waste was generated within or outside the town. In contrast, the Counties' flow control ordinances apply only to

waste generated within the Counties.[4] We do not rely on that distinction because, in *SSC Corp.*, we struck down a flow control ordinance as "indistinguishable" from the ordinance in *Carbone*, even though the challenged law, unlike *Carbone*, applied only to waste originating within the town. 66 F.3d at 514. Second, the Clarkstown ordinance differs from the Counties' ordinances because the transfer station in Clarkstown was owned by a "local private contractor." *Carbone*, 511 U.S. at 387, 114 S.Ct. 1677. The Counties' transfer station, as well as the other designated facilities, are publicly owned. This latter distinction is determinative.

The majority opinion in *Carbone* held that Clarkstown's flow control ordinance was "just one more instance of local processing requirements that [the Court] long [has] held invalid." *Id.* at 391, 114 S.Ct. 1677. Stated otherwise, the ordinance "hoard[ed] solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility," in that case "a single local proprietor." *Id.* at 392, 114 S.Ct. 1677. The Court repeatedly referenced the private nature of the favored facility and repeatedly alluded to the dangers of allowing local government to favor local industry or a single local

---

[4] Carbone owned a recycling facility within the Town of Clarkstown, but a significant amount of its waste was collected in the State of New Jersey. The briefs and oral argument transcript reveal that Carbone challenged the ordinance only to the extent that its application to waste originating out-of-state increased the cost of disposal for New Jersey generators and subjected Carbone to inconsistent local regulations. *See C & A Carbone v. Town of Clarkstown*, 1993 WL 757637, at *18-19 (U.S. Dec. 7, 1993) (oral argument transcript); *C & A Carbone v. Town of Clarkstown*, 1993 WL 433038, at *23 (U.S. July 16, 1993) (petitioners' brief); *see also Carbone*, 511 U.S. at 407, 114 S.Ct. 1677 (O'Connor, J., concurring) (striking the ordinance under the *Pike* test, in part because "operations like petitioners' cannot comply with the requirements of both [Clarkstown and the State of New Jersey]").

business over out-of-state competition. For example, the Court held that "the town may not employ discriminatory regulation to give [the designated facility] an advantage over *rival businesses* from out of State." *Id.* at 394, 114 S.Ct. 1677 (emphasis added). And again, "[s]tate and local governments may not use their regulatory power to favor *local enterprise* by prohibiting patronage of out-of-state competitors or their facilities." *Id.* (emphasis added).

United Haulers casts a blind eye to the Court's repeated reference to Clarkstown's favoritism for a single local proprietor. United Haulers contends that, read in conjunction, all three *Carbone* opinions imply a rejection of the distinction between public and private ownership for Commerce Clause purposes. The argument proceeds as follows: The dissenters in *Carbone* argued that the favored facility was an agent of the municipality and therefore publicly owned. Accordingly, the dissent argued that the ordinance did not discriminate against out-of-state business in favor of in-state business:

> While our previous local processing cases have barred discrimination in markets served by private companies, Clarkstown's transfer station is essentially a municipal facility, built and operated under a contract with the municipality and soon to revert entirely to municipal ownership....
>
> The majority ignores this distinction between public and private enterprise, equating Local Law 9's "hoard[ing]" of solid waste for the municipal transfer station with the design and effect of ordinances that restrict access to local markets for the benefit of local private firms.

See id. at 419-20, 114 S.Ct. 1677 (Souter, J., dissenting) (footnote omitted). The majority, the argument continues, although clearly aware of the dissent's contention, nonetheless held that the town may not use discriminatory regulation

to earn revenues for its project. This holding, according to United Haulers, necessarily rejected the distinction between public and private ownership relied on by the dissent.

We disagree with United Haulers' reading of *Carbone*. A careful reading of the separate opinions in *Carbone* does not support United Haulers' theory. Indeed, if we were to divine direct guidance from those opinions, we would reach the opposite conclusion; namely, that in *Carbone* the Justices were divided over the *fact of whether* the favored facility was public or private, rather than on the import of that distinction.

As noted above, the *Carbone* majority referenced the private character of the favored facility several times. *id.* at 387, 114 S.Ct. 1677 ("local private contractor"); *id.* at 392, 114 S.Ct. 1677 ("single local proprietor"); *id.* at 394, 114 S.Ct. 1677 ("to give that project an advantage over *rival businesses* from out of State" (emphasis added)). In contrast, Justice O'Connor, in her concurrence, characterized the Clarkstown scheme as a *public* monopoly, foreclosing competition from all competitors in-state and out-of-state. *See id.* at 402-03, 114 S.Ct. 1677. As such, Justice O'Connor rejected the notion that the Clarkstown ordinance should be found discriminatory and, thus, analyzed under the *Maine v. Taylor* framework. Instead, Justice O'Connor would have analyzed, and ultimately struck down, the ordinance under the *Pike* balancing test. *Id.* at 403-07, 114 S.Ct. 1677. Like Justice O'Connor, the three-justice dissent clearly articulated its view that the Clarkstown transfer station was public for dormant Commerce Clause purposes and, therefore, would have analyzed the ordinance under the *Pike* test. *See id.* at 410-30, 114 S.Ct. 1677. Unlike Justice O'Connor, however, the dissent would have upheld the ordinance. In the face of these opinions, the majority's frequent reference to the private local contractor that legally owned the transfer station and its silence regarding the distinction between public and private ownership leads us to conclude that underlying its analysis of

the constitutionality of the ordinance was a finding that the favored facility was private rather than public.

Nevertheless, we require more than the Court's silence on this point before concluding that it either rejected or accepted the public/private distinction advocated by the concurring and dissenting opinions. *See Fort Gratiot Sanitary Landfill v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 358-59, 112 S.Ct. 2019, 119 L.Ed.2d 139 (1992) (noting that the case did not "raise any question concerning policies that municipalities or other governmental agencies may pursue in the management of publicly owned facilities"). As the majority in *Carbone* did not directly address the issue and its language can fairly be described as elusive on that point, we proceed to examine those "local processing" cases, upon which the Court placed heavy reliance. This examination removes any remaining doubt we may have had regarding the importance of the distinction between private and public ownership in the dormant Commerce Clause analysis of such cases. As discussed in great detail by the *Carbone* dissent, in each and every one of the local processing cases the challenged laws favored a local private business, industry or investment (not a state-owned facility or a public monopoly) to the detriment of out-of-state competitors.

b. *The Local Processing Cases*

A commonly cited example of the Court's local processing cases is *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951). There, the Court struck down a city of Madison, Wisconsin ordinance that required all milk sold in the city to be pasteurized within five miles of the central portion of the city. The ordinance applied to all businesses, in-state and out-of-state. The "practical effect" of the ordinance, however, was to "erect[ ] an economic barrier protecting a *major local industry* against competition from without the State." 340 U.S. at 354, 71 S.Ct. 295 (emphasis added). The fact that out-of-state businesses could build pas-

teurizing facilities within the five-mile radius did not make it any less discriminatory. Requiring local investment benefitted the city at the expense of other states and municipalities. In *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984), a four-justice plurality confirmed that export restraints undertaken to "promot[e] employment" or investment within the state fell "within the rule of virtual *per se* invalidity." *Id.* at 100-01, 104 S.Ct. 2237. There, the Court struck down a state regulation requiring in-state processing of timber. *See id.*; *see also Hughes v. Oklahoma*, 441 U.S. 322, 338, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979) (striking statute that restricted the number of minnows that could be transported out-of-state); *Minnesota v. Barber*, 136 U.S. 313, 323, 10 S.Ct. 862, 34 L.Ed. 455 (1890).

Other decisions in the local processing line of cases evidence the same intent to prevent state or local governments from favoring in-state business or investment at the expense of out-of-state businesses. In *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032 (1935), another milk case, the Court struck down an ordinance which erected barriers to out-of-state competition of the local milk industry by instituting a "system of minimum prices." *Id.* at 519, 55 S.Ct. 497. In *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 49 S.Ct. 1, 73 L.Ed. 147 (1928), the Court struck down a Louisiana statute which forbade the export of shrimp unless the heads and hulls had first been removed within the state. *Id.* at 12-14, 49 S.Ct. 1; *see Johnson v. Haydel*, 278 U.S. 16, 49 S.Ct. 6, 73 L.Ed. 155 (1928) (striking a similar Louisiana statute regarding the pre-shipment processing of oysters); *see also Toomer v. Witsell*, 334 U.S. 385, 403-07, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948) (striking down South Carolina statute that required shrimp fishermen to unload, pack and stamp their catch before shipping it to another state). The Court held these statutes discriminatory because, whether in design or effect, they benefitted the local seafood processing industry over out-of-state competition.

United Haulers asks us to focus on the Court's broadly stated prohibition against the "hoarding" of local resources that otherwise would enter the stream of interstate commerce. A blanket prohibition against the hoarding of articles of commerce would appear to preclude the Counties' flow control scheme. However, we must interpret the Court's holdings in context, not in a vacuum. The common thread in the Court's dormant Commerce Clause jurisprudence, highlighted in the local processing cases discussed above, is that a local law discriminates against interstate commerce when it hoards local resources *in a manner* that favors local business, industry or investment over out-of-state competition. *See, e.g., College Sav. Bank v. Fl. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999) (describing the "evil" addressed by the Commerce Clause as "the prospect that States will use custom duties, exclusionary trade regulations, and other exercises of governmental power (as opposed to the expenditure of state resources) to favor their own citizens"). The majority in *Carbone* recognized this additional requirement while describing the evils of local processing laws: "Put another way, the offending local laws hoard a local resource—be it meat, shrimp, ... milk [or garbage]—*for the benefit of local businesses that treat it.*" 511 U.S. at 392, 114 S.Ct. 1677 (emphasis added).

There is sound reason for the Court's consistent, although often unstated, recognition of the distinction between public and private ownership of favored facilities:

> Reasons other than economic protectionism are ... more likely to explain the design and effect of an ordinance that favors a public facility.... An ordinance that favors a municipal facility, in any event, is one that favors the public sector, and if we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce

> Clause must reflect that position, then surely this Court's dormant Commerce Clause jurisprudence must itself see that favoring state-sponsored facilities differs from discriminating among private economic actors, and is much less likely to be protectionist.

Id. at 421, 114 S.Ct. 1677 (Souter, J., dissenting) (internal quotation marks and citation omitted). Not only are such regulations "less likely to be protectionist," *id.*, they are less likely to give rise to retaliation and jealousy from neighboring states. Moreover, ordinances that favor a public facility to the detriment of all private actors are equipped with a built-in check: municipal legislators are accountable to citizens, many of whose interests are likely to be aligned to some degree with the interests of private business, either as owners, employees or investors. Where the local legislation benefits local industry to the detriment of its competition, as in all of the local processing cases, this check is inadequate. Here it is not.

The principal burden of any economic inefficiency imposed by the Counties' ordinances falls on the residents of the Counties. They must pay over twice as much to dispose of their solid waste as they paid prior to the adoption of the ordinances. There is no evidence that any out-of-state business or individual is paying more for waste collection or disposal as a result of the ordinances (as was the case in *Carbone*). The plaintiffs here are local waste collection companies. While it is true that private waste processors both in-state and out-of-state are prevented by the ordinances from competing to perform and receive payment for the operations performed at the mandatory transfer station, that disadvantage does not fall more heavily on out-of-state concerns than on local ones. The out-of-state processors furthermore have not complained, and there is no indication the deprivation represents a meaningful economic loss.

> The Commerce Clause was not passed to save the citizens of Clarkstown from themselves. It should not be wielded to prevent them from attacking their local garbage problems with an ordinance that does not discriminate between local and out-of-town participants in the private market for trash disposal services and that is not protectionist in its purpose or effect.

Id. at 430, 114 S.Ct. 1677 (Souter, J., dissenting). To the extent that a state or local government risks causing inconsistent local laws or inciting retaliation among the states to the detriment of the "national market," the *Pike* test is a suitable vehicle for meaningful judicial review. 397 U.S. at 142, 90 S.Ct. 844; *see Healy v. Beer Inst.*, 491 U.S. 324, 336-37, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989) (holding that, under the *Pike* test, "the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States").

United Haulers also relies on the fact that no case has yet expressly relied on the distinction between public and private ownership, *see U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1067-68 (8th Cir. 2000); *Huish Detergents*, 214 F.3d at 715-16 (striking down regulation that awarded private local waste collection company franchise over County collection duties); *Waste Mgmt. v. Metro. Gov't*, 130 F.3d 731, 733-36 (6th Cir. 1997); *Harvey & Harvey*, 68 F.3d at 807-09 (remanding for consideration of effects of local action awarding exclusive waste disposal contract to private local business), and that a number of appellate and district courts have implicitly rejected the distinction without discussion. *See Waste Sys. Corp. v. County of Martin*, 985 F.2d 1381, 1385-89 (8th Cir. 1993) (striking down ordinance that required all waste generated within locality to be delivered to public waste facility); *Coastal Carting Ltd. v. Broward County*, 75 F.Supp.2d 1350, 1352 & n.1 (S.D.Fla. 1999); *Randy's Sanitation v. Wright County*, 65 F.Supp.2d 1017 (D.Minn. 1999);

Zenith/Kremer Waste Sys. v. W. Lake Superior Sanitary Dist., 1996 WL 612465, at *1-*3, *10 n.13 (D.Minn. July 2, 1996); *Waste Recycling v. Southeast Ala. Solid Waste Disposal Auth.*, 814 F.Supp. 1566, 1570, 1577-83 (M.D.Ala. 1993) (striking down flow control ordinances which required all waste to be delivered to a Public Authority landfill), *aff'd*, 29 F.3d 641 (11th Cir. 1994) (unpublished table decision). Assuming that these courts were faced with pure public ownership of the favored facility, as we are here, their holdings are not binding on our determination and have little persuasive value given that the courts did not directly address the issue we decide today.

Only one case has expressly addressed and rejected the distinction. *See Southcentral Pa. Waste Haulers Ass'n*, 877 F.Supp. at 943. There, private waste haulers were required by law to deliver all solid waste to a landfill, owned and operated by the local solid waste authority, a public corporation. *Id.* at 938. The defendants, like the Counties and the Authority here, argued that *Carbone* did not apply to an ordinance that favored a publicly owned facility. *Id.* at 943. The district court, relying primarily on the Supreme Court's statements about hoarding local resources, was "not persuaded that the public nature of the Authority facility changes the applicable analysis." *Id.* (citing *Waste Sys. Corp.*, 985 F.2d at 1387, and *Waste Recycling*, 814 F.Supp. at 1578). We believe that it does change the analysis and we respectfully disagree with that decision for the reasons already discussed.

Moreover, we find ample precedential support for our conclusion in (1) the consistent underlying facts of the local processing line of cases, a line in which the majority squarely placed *Carbone*, and (2) the opinions of four Supreme Court Justices, all of whom characterized the facility in *Carbone* as publicly owned, and therefore would have analyzed the challenged ordinance under the more lenient *Pike* test. In this case, unlike *Carbone*, there is no confusion or room for de-

bate regarding the ownership of the favored facilities. They are owned by the Authority, a public entity, and not by any local business.

To summarize, a flow control ordinance governing the processing of waste is not discriminatory under the Commerce Clause unless it favors local private business interests over out-of-state interests. Flow control regulations like the Oneida-Herkimer ordinances, which negatively impact all private businesses alike, regardless of whether in-state or out-of-state, in favor of a publicly owned facility, are not discriminatory under the dormant Commerce Clause. The district court erred by so holding.

C. The *Pike* Balancing Test

Having concluded that the Counties' system does not discriminate against interstate commerce in favor of in-state business interests, we admit a temptation to undertake the *Pike* balancing test in the first instance.

This temptation, to which we do not succumb, arises from the well-settled principle that waste disposal is a traditional local government function. *See* Resource Conservation and Recovery Act, 42 U.S.C. § 6901(a)(4); N.Y. Gen. Mun. L. § 120-aa; *Carbone*, 511 U.S. at 419-20, 114 S.Ct. 1677 (Souter, J., dissenting); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956, 102 S.Ct. 3456, 73 L.Ed.2d 1254 (1982) ("[P]rotecting the health of its citizens—and not simply the health of its economy—is at the core of its police power."); *see also Cal. Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306, 320-21, 26 S.Ct. 100, 50 L.Ed. 204 (1905); *Gary D. Peake Excavating*, 93 F.3d at 76 ("Legislation pertaining to public health and safety consistently has been recognized as an important local interest.").

In the past, we have held that a municipality "has legitimate—indeed, compelling—interests that are served by its waste management program." *USA Recycling*, 66 F.3d at

1288. In *USA Recycling* we went so far as to state that "[t]he local interests that are served by consolidating garbage service in the hands of the town—safety, sanitation, reliable garbage service, cheaper service to residents—would in any event outweigh any arguable burdens placed on interstate commerce." *Id.* at 1295; *see Carbone*, 511 U.S. at 430, 114 S.Ct. 1677 (Souter, J., dissenting) (arguing that any burdens on interstate commerce were "readily justified by the ordinance's legitimate benefits in reliable and sanitary trash processing"). *But see Carbone*, 511 U.S. at 407-10, 114 S.Ct. 1677 (O'Connor, J., concurring). We will follow our own advice, however, and resist the temptation to rule as a matter of law prior to adequate discovery and further argument by the parties, which will undoubtedly assist the district court in this fact-intensive determination.

We do hold, however, that although it does not, in and of itself, give a municipality free reign to place burdens on the free flow of commerce between the states, the fact that a municipality is acting within its traditional purview must factor into the district court's determination of whether the local interests are substantially outweighed by the burdens on interstate commerce. With that understanding, we reverse and remand for a determination of whether the Counties' flow control laws pass constitutional muster under the *Pike* balancing test.

CONCLUSION

For the foregoing reasons, we reverse the district court's judgment and remand for further proceedings consistent with this opinion.

The parties shall bear their own costs.

CALABRESI, J., concurring:

I concur in both the result and the opinion. I do so because this case deals with waste processing by a publicly owned facility. Waste disposal is both typically and tradi-

tionally a local government function. With respect to such functions, the opinion's analysis of the significance of public ownership under *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994), seems to me quite right. Whether the same analysis would apply to activities that are not traditionally governmental is not before us. This case therefore does not answer the question of how such situations are to be examined in light of *Carbone*.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED HAULERS ASSOC., INC., ET AL.,

5:95-CV-516 (NAM/DEP)

Plaintiffs,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA AND COUNTRY OF HERKIMER

Defendants.

Appearances:	**Of Counsel:**
DEVORSETZ STINZIANO GILBERTI HEINTZ & SMITH, P.C. *Counsel for Plaintiffs* 30 Pearl Street, 1st Floor Albany, New York 12207	Kevin C. Murphy, Esq. Lisa DiPoala Haber, Esq. Timothy J. Lambrecht, Esq.
GERMANO & CAHILL, P.C. *Counsel for Defendant Oneida-Herkimer* Solid Waste Management Authority 4250 Veterans Memorial Highway, Suite 275 Holbrook, New York 11741	Michael J. Cahill, Esq.
FOLEY FRYE & FOLEY *Counsel for Defendant Oneida County* 2219 Genesee Street	Richard A. Frye, Esq.

Utica, New York 13501

HORIGAN HORIGAN PENNOCK & LOMBARDO — Thomas E. Kelly, Esq.
Counsel for Defendant Herkimer County
49 East Main Street, Box 520
Amsterdam, New York 12010

NORMAN A. MODUE, District Judge

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiffs, an amalgamation of solid waste collectors, haulers, processors and disposers, along with a trade association whose membership includes solid waste management companies, complain herein about the high cost of trash disposal. The present dispute is one in a long line of "garbage" cases that the Second Circuit remarked has been "clog[ging]" the federal docket for some time. *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 505 (2d Cir.1995). Indeed, the facts and background of this case are recounted thoroughly in a previous opinion by the Second Circuit, *United Haulers Assoc., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245 (2d Cir. 2001). In short, plaintiffs allege that solid waste flow control provisions enacted by the defendant Counties which result in elevated charges for disposal of solid waste at facilities designated by the defendant Authority are unconstitutional.

Plaintiffs commenced this action on April 14, 1995, alleging that the aforementioned flow control legislation enacted by the defendant Counties unconstitutionally discriminates and/or unduly burdens interstate commerce in violation of the Commerce Clause. The previous district court judge assigned to this case agreed with plaintiffs in March 2000, and entered summary judgment in their favor. The previous district court found that the garbage flow con-

trol laws enacted by the defendant Counties were a per se violation of the Constitution's dormant commerce clause which restricts certain state regulation of interstate commerce. The Second Circuit thereafter reversed with the admonition that the waste management scheme enacted by defendants did not on its face or in obvious effect discriminate against interstate commerce in favor of in-state business interests. *United Haulers*, 261 F.3d at 263. The Circuit remanded the case for completion of discovery and application of the balancing test suggested by the Supreme Court in *Pike v. Bruce Church, Inc.*, 397 U.S.137, 142 (1970). There, the Supreme Court held that when reviewing legislation that "regulates [commerce] even-handedly to effectuate a legitimate local public interest" and its effects on interstate commerce are only incidental, the legislation should be upheld "unless the burden imposed on [interstate commerce] is clearly excessive in relation to the putative local benefits." *Id.*, 397 U.S. at 142.

Upon remand and after completion of substantial discovery, both parties moved for, summary judgment asserting the absence of disputed material facts. Because of his substantial involvement in numerous discovery disputes between the parties and his consequent intimate familiarity with the background of this matter, the parties' cross-motions for summary judgment were referred to the Hon. David E. Peebles, United States Magistrate Judge, for a Report-Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72.3(c). After finding plaintiffs had failed to demonstrate that the disputed flow control provisions resulted in any burden whatsoever on interstate commerce, Magistrate Judge Peebles recommended that defendants' motions for summary judgment dismissing the complaint be granted. Plaintiffs fled timely objections to the Report-Recommendation. Defendants did not object.

In addition to the parties' cross-motions for summary judgment, the Magistrate Judge also considered plaintiffs'

motion to strike two attorneys' affidavits submitted by counsel for defendants in connection with the pending dispositive motions. Magistrate Peebles recommended largely granting said motion. There were no objections filed to this portion of the Report-Recommendation..

Pursuant to 28 U.S.C. § 636(b)(l)(C), this Court engages in a de novo review of any part of a magistrate judge's report-recommendation to which a party specifically objects. However, "[w]hen parties make only frivolous, conclusive or general objections, the court reviews the report-recommendation for clear error." *See Brown v. Peters*, 1997 WL 599355 at *2 (N.D.N.Y.1997) (Pooler, J.) (citing *Camardo v. General Motors Hourly-Rate Employees Pension Plan*, 806 F.Supp. 380, 382 (W.D.N.Y. 1992)); *see also Greene v. WCI Holdings Corp.*, 956 F.Supp. 509, 513 (S.D.N.Y. 1997). Failure to object timely to any portion of a magistrate's, report-recommendation operates as a waiver of further judicial review of those matters. See *Roldan v. Racette*, 984 F.2d 85, 89 (2d Cir. 1993); *Small v. Secretary of Health & Human Serv.*, 892 F.2d 15, 16 (2d Cir. 1989).

II. FACTUAL BACKGROUND

The facts on which the present motion is based are set forth in the Report-Recommendation prepared by Magistrate Judge Peebles which this Court adopts:

> Oneida and Herkimer are two contiguous counties located in Central New York, comprising a geographical area in excess of 2600 square miles with a combined population of approximately 306,000, residing in seventy-eight separate municipalities. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 248 (2d Cir. 2001). During the 1980s the two counties undertook joint exploration of ways to address what has been described by the defendants as a "solid waste crisis." *United Haulers*, 261 F.3d at 249. Those collaborative

efforts of the two counties led ultimately to the creation in 1988 of the Authority, a public benefit corporation operated under N.Y. Public Authorities Law § 2049-aa *et seq.* (McKinney 2000), and empowerment of the Authority to collect, process and dispose of all solid waste generated within the two counties. *United Haulers*, 261 F.3d at 249.

Following its creation, the Authority entered into contracts with Herkimer and Oneida Counties to manage and dispose of the solid waste generated within their respective boundaries. *Id.* To implement those agreements, the two counties enacted flow control provisions which, in essence, require that all solid waste generated within them, whether collected by a municipality or a licensed private hauler, or instead delivered by the generator, be deposited at approved processing sites designated by the Authority. *United Haulers*, 261 F.3d at 249. The net effect of these flow control provisions and their requirement that any solid waste collected by them within the two counties must be conveyed to processing facilities established by the Authority is that trash haulers and generators are required to deliver solid waste to those designated central collection points, and to make a per ton payment — often referred to as a "tipping fee" — for all solid waste delivered. *United Haulers*, 261 F.3d at 251. The tipping fee payable to the Authority typically is significantly higher than that charged by privately operated instate and out-of-state disposal facilities. *Id.* The solid waste delivered to the Authority for processing is then removed and dispensed with by private disposal companies operating under a

competitively-bid contract with the Authority. *Id.* at 250-51.[1]

---

[1] In footnotes included as part of this portion of the Report-Recommendation and Order, Magistrate Judge Peebles also included the following information:

1) The Oneida County flow control law, passed in December of 1989, provides that:

> [i]n order to provide for public health and safety and to facilitate the conservation of vital resources: Each person shall provide for the removal of solid waste and recyclables from the property on which they are generated either through a service provided by a municipality or licensed private hauler or by direct haul by the individual generator to a disposal location approved by the County.

Oneida County Local Law No. 1 of 1990, as cited in *United Haulers*, 261 F.3d at n.1; *see also* Defendants' Exhibits Vol. I (Dkt. No. 167) Exh. 13. The Herkimer County flow control provision, adopted in February of 1990, is substantially similar, providing that:

> [a]fter placement of garbage and of recyclable materials at the roadside or other designated area approved by the Legislature by a person for collection in accordance herewith, such garbage and recyclable material shall be delivered to the appropriate facility designated by the Legislature, or the Authority pursuant to contract with the County.

Herkimer County Local Law No. 1 of 1990, as cited in *United Haulers*, 261 F.3d at n.2.; *see also* Defendants' Exhibits Vol. I (Dkt. No. 167) Exh. 12; and

2) According to Ronald N. Soltys, who gave an affidavit in this action in July of 1995 at a time when he chaired that county's legislature, the impetus for Herkimer County's efforts to address waste management issues included concerns over existing landfills and their environmental impact, the lack of any

III. THE REPORT-RECOMMENDATION

After setting forth the appropriate standard for summary judgment, the Magistrate Judge concluded that while there were genuinely disputed issues of fact in the record submitted by the parties, none of the disputed facts was material to the outcome of the litigation. After analyzing all evidentiary submissions and arguments of the parties, Magistrate Judge Peebles found that the flow control provisions complained of by plaintiffs impose no burdens on interstate commerce "that are qualitatively or quantitatively different from those experienced in relation to intrastate commerce." Based thereupon the Magistrate Judge found no need to weigh the nonexistent burdens of the flow control legislation against its putative benefits as required by Pike and recommended that this Court: 1) deny plaintiffs' motion for summary judgment; 2) and grant defendants' cross-motion for summary judgment dismissing the complaint in its entirety.

Having conducted a *de novo* review of the record, the Court agrees with the determination of the Magistrate Judge

---

significant recycling efforts within the county, and problems experienced with the dumping of residential household garbage, construction debris and roofing waste along county roads. *See* Singh Aff. (Dkt. No. 159) Exh. A. The genesis of Oneida County's participation was described by one former Oneida County Legislator (now a New York State Supreme Court Justice), Robert Julian, to include concern over the lack of interested participants in the local waste management industry, owing to the fact that one vendor held a competitive advantage by virtue of its ownership of the local landfill utilized for waste disposal. Julian Affidavit, dated July 5,1995 (Dkt. No. 24), repeated at Defendants' Exhibits Vol. III (Dkt. No. 174) Tab 32994-9. The Julian Affidavit also chronicles the same types of solid waste disposal problems which confronted Herkimer County and led lawmakers to take action, as well as concerns over environmental hazards associated with local landfill operations. *Id.*¶9 13-28.

that defendants' motion for summary judgment should be granted.

IV. DISCUSSION

A. Standard of Review

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). Substantive law determines which facts are material; that is, which facts might affect the outcome of the suit under the governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 258 (1986). Irrelevant or unnecessary facts do not preclude summary judgment, even when they are in dispute. *See id.* The moving party bears the initial burden of establishing that there is no genuine issue of material fact to be decided. *See Celotex Corp v. Catrett*, 477 U.S. 317, 323 (1986). With respect to any issue on which the moving party does not bear the burden of proof, it may meet its burden on summary judgment by showing that there is an absence of evidence to support the nonmoving party's case. *See id.* at 325. Once the movant meets this initial burden, the nonmoving party must demonstrate that there is a genuine unresolved issue for trial. *See* Fed. R. Civ. P. 56(e). It is with these considerations in mind that the Court reviews plaintiffs' objections to the Report-Recommendation.

B. Relevant Constitutional Framework

The "dormant" Commerce Clause is a judicial creation. *C.A. Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 401 (1994) (O'Connor, J., concurring). On its face, the Commerce Clause provides only that "[t]he Congress shall have Power ... To regulate Commerce ... among the several States...." U.S. Const., Art. I, § 8, cl. 3. The Supreme Court has consistently concluded, however, that the Clause not only empowers Congress to regulate interstate

commerce, but also imposes limitations on the States in the absence of congressional action:

> This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units.... [W]hat is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537-38 (1949) (internal quotation marks and citations omitted). The Supreme Court has determined that the dormant Commerce Clause forbids States and their subdivisions from regulating interstate commerce. See *id.* at 535 (Supreme Court "consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state;").

However, the Supreme Court has traditionally distinguished between two types of impermissible regulations. "A facially nondiscriminatory regulation supported by a legitimate state interest which incidentally burdens interstate commerce is constitutional unless the burden on interstate trade is clearly excessive in relation to the local benefits." *Carbone*, 511 U.S., at 403 (citing *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986); Pike, 397 U.S. at 142)). Where, however, a regulation "affirmatively" or "clearly" discriminates against interstate commerce on its face or in practical effect, it violates the Constitution unless the discrimination is demonstrably justified by a valid factor unrelated to protectionism. *See Maine v. Taylor*, 477 U.S.131, 138 (1986). "In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." *Brown-Forman Distillers*, 476 U.S., at 579.

C. Supreme Court's Analysis of Flow Control Legislation

In *Carbone*, the Supreme Court for the first time applied the Commerce Clause to a local solid waste flow control ordinance. There, the Town of Clarkstown, New York agreed with environmental authorities to close its landfill and build a solid waste transfer station. *See Carbone*, 511 U.S. at 387. A local private contractor agreed to construct the facility, which the local contractor would own and operate for a period of five years. *Id.* The town thereafter agreed to buy the station back for one dollar. *Id.* To make the endeavor worthwhile, the contractor charged a set tipping fee for each ton of solid waste disposed of at the transfer station. The town guaranteed the transfer station a minimum yearly waste flow, which was intended to generate tipping fees sufficient to finance the cost of the facility. *See id.* at 412. To meet the minimum tonnage guarantee, the town enacted a flow control ordinance that required all waste within the town to be delivered to the transfer station. *Id.*

Upon review, the Supreme Court found the town's ordinance unconstitutional because it "hoard[ed] solid waste, and the demand to get rid of it, for the benefit of "a single local proprietor." *Id.* at 392. Relying on the private nature of the favored facility, the Court found that the town could "not employ discriminatory regulation to give [the designated private facility] an advantage over rival businesses from out of State." *Id.* at 394. Further, the Court held that "[s]tate and local governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities." *Id.*

D. Second Circuit's Analysis of Defendants' Flow Control Provisions

After *Carbone*, the "Supreme Court ... left no doubt that flow control regulation," though passed by municipal legislatures and aimed at local or regional solid waste concerns, "af-

fects interstate commerce." *United Haulers*, 261 F.3d at 255. The Circuit found that like the legislation at issue in *Carbone*, the flow control laws at issue here do not escape "a deeper dormant Commerce Clause review." *Id.* Indeed, "[w]hile the immediate effect of the [legislation] is to direct local transport of solid waste to a designated site within the local jurisdiction, its economic effects are interstate in reach." *Id.* (quoting *Carbone*, 511 U.S. at 389). Here as in *Carbone*, however, "[t]he real question is whether the flow control ordinance[s] [are] valid despite [their] undoubted effect on interstate commerce." 511 U.S. at 389.

The Second Circuit distinguished the flow control laws enacted by defendants from those at issue in *Carbone* on two grounds:

> First, the Clarkstown ordinance applied to all solid waste within the town, whether that waste was generated within or outside the town. In contrast, the Counties' flow control ordinances apply only to waste generated within the Counties ....Second, the Clarkstown ordinance differs from the Counties' ordinances because the transfer station in Clarkstown was owned by a "local private contractor." *Carbone*, 511 U.S. at 387. The Counties' transfer station, as well as the other designated facilities, are publicly owned.

United Haulers, 261 F.3d at 258. The Court found the latter distinction to be "determinative." *Id.* After performing an exhaustive review of the Supreme Court's jurisprudence in the "local processing line" of Commerce Clause cases, the Second Circuit observed an unmistakable intent on the part of the Court to prevent state or local governments from favoring in-state business or investment at the expense of out-of state businesses. *Id.* at 260.

According to the Second Circuit, the previous district court judge erroneously attributed to the Supreme Court a per se prohibition against flow control laws. *Id.* at 256. Based

thereupon, the district court mistakenly applied the strict scrutiny test advanced by the Supreme Court in *Maine v. Taylor*, *supra*. In Maine, the Supreme Court held that discrimination against interstate commerce in favor of local business or investment is *per se* invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest. 477 U.S. at 151. However, in this case, the public nature of the favored waste management facilities renders the flow control ordinances non-discriminatory

> To summarize, a flow control ordinance governing the processing of waste is not discriminatory under the Commerce Clause unless it favors local private business interests over out-of-state interests. Flow control regulations like the Oneida-Herkimer ordinances, which negatively impact all private businesses alike, regardless of whether in-state or out-of-state, in favor of a publicly owned facility, are not discriminatory under the dormant Commerce Clause.

United Haulers, 261 F.3d at 263. Based on the non-discriminatory effect on commerce created by the flow control laws, the challenged provisions should have been analyzed under the less restrictive balancing test prescribed in *Pike*. *Id.* at 257. Applying *Pike*, the district court should have determined whether the flow control laws' effects on interstate commerce substantially outweigh the local benefits. *See id.*

The Circuit "admit[ted] a temptation" to undertake the Pike balancing test itself. *Id.* at 263. "This temptation ... [arose] from the well-settled principle that waste disposal is a traditional local government function." *Id.* Waste management legislation, which pertains to the public health and safety of citizens, is the type of regulation traditionally upheld as a compelling local interest. *See id.* (citations omit-

ted). However, in the absence of adequate discovery and further argument from the parties, the Court declined to find as a matter of law that the flow control laws passed constitutional muster.

E. Application of *Pike*

Under the *Pike* balancing test, plaintiffs are required to show that the flow control laws, although enacted for a legitimate public purpose and apparently evenhanded, actually 1) impose" 'burdens on interstate commerce that exceed the burdens on intrastate commerce,' " *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 217-28 (2d Cir. 2004) (citations omitted) (New York cigarette contraband statutes, conditioning tax stamp issuance on cigarette manufacturer either being participant in multi-state tort suit settlement agreement or making escrow payments required of nonparticipants, did not violate dormant Commerce Clause absent showing of disparate impact on interstate commerce; statute applied equally to in-state and out-of-state, manufacturers, and state's generation of revenues at expense of in-state and out-of-state economic interests alike was not invalidly protectionist); and 2) that those excess burdens on interstate commerce are "clearly excessive in relation to the putative local benefits," *Id.* (quoting *Pike*, 397 U.S. at 142). "[T]he statute, at a minimum, must impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce." *Id.* (quoting *Nat'l Elec. Mfrs. Assn. v. Sorrell*, 272 F.3d 104,109 (2d Cir. 2001) Under the *Pike* test, "if no such unequal burden be shown, a reviewing court need not proceed further." *Id.* "The bottom line is therefore that, under either the "clear discrimination" or the "*Pike*" forms of analysis, "the minimum showing required ... is that [the state statute] have a disparate impact on interstate commerce." *Id.* (citation omitted).

Because he found that the flow control ordinances at issue herein have no such disparate impact, either facially or in

incidental effect, the Magistrate Judge deemed plaintiffs' claims deficient as a matter of law.

> Under the regime now being challenged, a local private trash business is treated no differently than one situated out of state. Any hauler, for example, is permitted to collect solid waste within the counties of Herkimer and Oneida. Similarly, any trash hauler, regardless of location, is entitled to bid on the right to contract for the hauling of waste from transfer stations for disposal and all private concerns are disqualified, without exception, from the processing phase. Finally, the ordinances place no restriction on the final disposal location for waste hauled from the transfer station, subject to the ultimate goal of establishing an Authority-operated disposal site. While [plaintiffs' expert] noted the counties' system deprives trash collectors the opportunity to align with disposal companies, and thereby gain competitive advantage, this applies equally to both in-state and non-New York based entities. Simply stated, there is no distinction between the treatment of interstate as opposed to intrastate providers under the disputed regulations.

Based thereupon, Magistrate Judge Peebles determined: 1) that plaintiffs had failed to make the threshold showing required under *Pike*; and 2) that it was therefore unnecessary to proceed to the second part of the test, *e.g.*, balancing the burdens against the putative benefits associated with the legislation.

This Court has reviewed the entire record herein and likewise finds no distinction in the treatment of in-state versus out-of-state businesses under the challenged flow control ordinances. Importantly, in arguing that the legislation nevertheless violates the Commerce Clause, plaintiffs do not dispute the absence of the required discriminatory impact on

non-New York businesses. Rather, they quibble over the definition of a "burden" on interstate commerce and argue that limiting the present inquiry to whether the flow control provisions favor an in-state "business" interest is too narrow based on historical Commerce Clause jurisprudence.

Plaintiffs are mistaken. Their argument that the Magistrate Judge misinterpreted and misapplied *Pike* because he required them to show a discriminatory burden on interstate commerce misses the mark for several reasons. Indeed, review of plaintiffs' objections to the Report-Recommendation reveals that they have apparently confused the notion of a permissible "incidental" burden on interstate commerce with one that is prohibitively discriminatory. For instance, Section A(2) of plaintiffs' objections is captioned "Plaintiffs Object to the Magistrate's Determination that to Establish an Incidental Burden, Plaintiffs Must Prove Discrimination." In essence, plaintiffs contend that *Pike* does not require a showing of discriminatory impact. To wit, they argue that *Pike* is only applied **after** a court determines that a challenged statute which regulates even-handedly" is **not** discriminatory and therefore not subject to strict scrutiny analysis. According to plaintiffs, "by definition, a statute that is subject to *Pike* (*i.e.*, one that regulates ***even-handedly***) is not discriminatory." Plaintiff's Objections to the Report Recommendation, p. 11 (emphasis in original).

Here, the Second Circuit has already deemed the flow control ordinances in this case nondiscriminatory on their face and therefore subject to *Pike*. Plaintiffs charge that the Magistrate Judge did not apply *Pike*, but instead simply repeated the same test used by the Circuit because he found the flow control ordinances satisfactory under *Pike* based on plaintiffs' failure to demonstrate discriminatory impact on interstate commerce. Plaintiffs aver: "If this were the correct approach, having failed the test for discrimination (or proven to be even-handed), no statute would ever be invalidated under *Pike* because there would never be a threshold finding of

an incidental burden." *Id.* The problem for plaintiffs under this view is that *Pike* does not require them to demonstrate an "incidental" burden on commerce. The incidental or consequential burden on commerce imposed by the flow control regulations is **presumed**. It is only those "incidental" burdens which are "excessive in relation to the local putative local benefits" which are prohibited under the Commerce Clause. *Pike*, 397 U.S. at 142.

Moreover, contrary to plaintiff's argument, statutes like the flow control ordinances in this case are not presumed to be non-discriminatory if they regulate even-handedly. If a statute is discriminatory on its face, it is subject to strict scrutiny. *See Freedom Holdings*, 357 F.3d at 217 ("A state statute violates the 'clear discrimination' standard when it constitutes 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.' *Or. Waste Sys., Inc. v. Dept of Envtl. Quality*, 511 U.S. 93, 99 (1994); *see also West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192 (1994) ("[T]he [dormant] Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.") (internal citation and quotation marks omitted)). "In contrast, under the Pike balancing test, appellants must show that a statute enacted for a legitimate public purpose although apparently evenhanded, actually imposes burdens on interstate commerce that exceed the burdens on intrastate commerce." *Id.* (citations omitted) (emphasis added). In short, legislation may appear to have no disparate impact on in-state versus out-of-state commercial interests or even be designed to regulate interstate commerce evenhandedly. However, even if such apparently neutral legislation has the effect — even an unintended one — of negatively impacting commerce between the states, it is prohibited by the Commerce Clause. *See Pike*, 397 U.S. at 145 (striking down neutral packaging law which required all cantaloupes grown in Arizona and

shipped out of state to be so labeled because it would require a single Arizona grower which sent its raw crop out of state for packaging and distribution to build a packing plant in the state).

In this case, the Counties' flow control regulations are evenhanded because they "negatively impact all private businesses alike, regardless of whether in-state or out-of-state." *United Haulers*, 261 F.3d at 263. Nevertheless, the Second Circuit held out the possibility that under *Pike*, the negative impact of the ordinances on interstate commerce could outweigh their local utility. Like the appellants in *Freedom Holdings*, plaintiffs here have not and cannot identify "**any** in-state commercial interest that is favored, directly or indirectly," by the waste management legislation enacted by defendants at the expense of out-of-state competitors. 357 F.3d at 218 (emphasis added). In the absence of any evidence that the flow control laws impacted interstate commerce differently than intrastate commerce, there were no detrimental "effects" to weigh against the putative benefits of the legislation. Thus, it was not error, as plaintiffs contend, for the Magistrate Judge to decline to engage in the second part of the *Pike* balancing test by weighing non-existent burdens against obvious benefits. Likewise, it was not error for Magistrate Judge Peebles to fail to consider "less restrictive" means than the challenged flow control ordinances of financing Authority facilities. Short of evidence that interstate commerce is indeed being "restricted" by the subject provisions, weighing of alternatives was and remains unnecessary.

Plaintiffs contend that the Magistrate Judge erred in concluding that they were required to show negative impact to commercial interests outside the state to show discriminatory effect. This, according to plaintiffs, too "narrowly" defines commerce. Fatal to plaintiffs' contention, however, is the obvious fact that commerce is "commercial." Under the Commerce Clause, states are prohibited from regulating interstate private business activity. They are notably not pro-

hibited from regulating or even favoring public facilities at the expense of private business. *See United Haulers*, 261 F.3d at 263 (citing its own language in *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272,1295 (2d Cir. 1995) wherein the Court stated that "[t]he local interests that are served by consolidating garbage service in the hands of the town — safety, sanitation, reliable garbage service, cheaper service to residents — would in any event outweigh any arguable burdens placed on interstate commerce.") (citations and inner quotation marks omitted).

The Second Circuit could not have been clearer in its earlier opinion in this case that the public nature of the Authority was a determinative factor in this case. In the first instance, the public nature of the Authority which was favored at the expense of private business was the primary factor which rendered the flow control ordinances non-discriminatory on their face. *See id.* at 257. Secondly, to the extent that the ordinances might effectively impact businesses out of state, the public purpose of the flow control legislation and the corresponding public benefit which inures to the Authority as the regulator of solid waste in the defendant Counties is something the Circuit found "must" factor into the district court's determination under *Pike* of whether the benefits of the challenged flow control ordinances are outweighed by the burdens on interstate commerce." *Id.* at 264. Based thereupon, it was not error for the Magistrate to restrict his inquiry to evidence of a disparate impact of the regulations on in-state and out-of-state private businesses.

In a related argument, plaintiffs object to the Magistrate Judge's characterization of this case as one involving "performance by a municipal authority of a function traditionally carried out by municipalities — the collection and disposal of solid waste." That the Second Circuit, as well as the Supreme Court, heartily agree with this characterization could not have escaped plaintiffs' notice. *See United Haulers*, 261 F.3d at 263 ("waste disposal is a traditional local government

function."); *see also USA Recycling*, 66 F.3d at 1295 ("This case boils down to two simple propositions. First, towns [or counties via public waste management authorities] can assume exclusive responsibility for the collection and disposal of local garbage...."); *see also Carbone*, 511 U.S. at 405 (O'Connor, concurring) ("The local interest in proper disposal of waste is obviously significant."). The Circuit remanded the case to this Court for application of the *Pike* balancing test with the following admonition: "[A]lthough it does not, in and of itself, give a municipality free reign to place burdens on the free flow of commerce between the states, the fact that a municipality is acting within its traditional purview must factor into the district court's determination of whether the local interests are substantially outweighed by the burdens on interstate commerce." *Id.*

In a second related argument, plaintiffs assert that evidence that the waste management scheme at issue in this case will incidentally benefit the local economy is evidence of the "protectionist" nature of the flow control ordinances. In support of this argument they cite, *inter alia*, a recent statement by the executive director of the Authority who opined, after receiving final authority to build a public landfill, that in addition to providing comprehensive waste management services to the region, the project would "also" keep waste management dollars in the Counties and preserve jobs. It is obvious that as a consequence of creating a "comprehensive waste management system in an attempt to provide for the safe and cost-effective disposal of their residents' solid waste," *United Haulers*, 261 F.3d at 248, the Counties will also likely support and stimulate the local economy. However, it is neither reasonable in theory nor supportable on the present record to conclude that the primary purpose of the waste management scheme, and the flow control ordinances in particular, is to favor businesses within the Counties at the expense of their out-of-state counterparts. Moreover, even if plaintiffs had presented evidence — which they have not —

of pretext by defendants in the apparent versus actual reasons for enacting the flow control ordinances, it remains that the Authority, the favored facility herein, is a public entity managing an indisputably important local issue of public health and safety.

Moreover, there is no proof that the regulations are anything but evenhanded in their impact on private businesses regardless of location. As a result of the flow control ordinances, it is more expensive for every entity involved in or impacted by garbage disposal in the two counties to conduct business. Plaintiffs assert that as a result of the challenged flow control provision, "non-local haulers are either cut out of the market or must invest capital in a local facility" but provide no evidence demonstrating any actual business has suffered under such an alleged burden. As a further matter it is obvious that local economy in the two Counties — insofar as attracting residents and new business with government services and perhaps even creating jobs — has been or will be improved by the comprehensive nature of the waste management scheme. However, there is no proof that this local benefit was the **purpose** of enacting the flow control laws rather than a welcome incidental effect. At bottom, the challenged laws do not treat similarly situated in-state and out-of-state business interests differently. Thus, they are not prohibitively "protectionist" in purpose or effect as that term has been defined in Commerce Clause jurisprudence. *See Carbone*, 511 U.S. at 394 ("State and local governments may not use their regulatory power to ***favor local enterprise*** by prohibiting patronage of out-of-state competitors or their facilities.") (emphasis added). It was not error for the Magistrate Judge to refuse to revisit the issue of whether strict scrutiny should apply to the Counties' flow control ordinances. Short of evidence demonstrating that private businesses are regulated or impacted differently by the Authority, there is no Commerce Clause violation.

Finally, plaintiffs object to the Magistrate Judge's alleged failure to "make specific findings of undisputed material facts" concerning the lack of evidence of demonstrable discriminatory impact of the flow control ordinances. Of course plaintiffs point to no fact overlooked by the Magistrate Judge which would alter the ultimate conclusion that they have not demonstrated any Commerce Clause violation in this case. The Magistrate Judge produced an accurate and detailed account of the factual and procedural history in this case as well as a thorough recitation of the evidence in the record — or lack thereof — on the critical issues. As such, the Court finds no error in Magistrate Judge Peebles' conclusions in connection therewith.

V. CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the Report-Recommendation of Magistrate Judge Peebles is hereby adopted in its entirety based upon the reasons set forth by the Magistrate Judge in his Report-Recommendation and after *de novo* review upon those additional reasons set forth herein and it is therefore

ORDERED that the defendants' motion for summary judgment is GRANTED and the complaint is hereby dismissed.

IT IS SO ORDERED.

Dated: March 24, 2005
Syracuse, New York

/S/NORMAN A. MORDUE
Norman A. Mordue
U.S. District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

UNITED HAULERS ASSOC., INC., ET AL.,

Plaintiffs,

v.

Civil Action
No. 95-CV-516 (NAM/DEP)

ONEIDA-HERKIMER SOLID WASTE
MANAGEMENT AUTHORITY, ET AL.,

Defendants.

APPEARANCES: _____ OF COUNSEL:

FOR PLAINTIFFS:

DEVORSETZ, STINZIANA, GILBERTI HEINTZ & SMITH
555 East Genesee St.
Syracuse, New York 13202

Kevin C. Murphy, Esq.
Lisa DiPoala Haber, Esq.
Timothy J. Lambrecht, Esq.

For Defendants:

GERMANO & CAHILL, P.C.
Attorneys for Defendant
Oneida-Herkimer
Solid Waste Management
Authority
4250 Veterans Memorial
Highway, Suite 275
Holbrook, NY 11741

Michael J. Cahill, Esq.

FOLEY, FRYE & FOLEY — Richard A. Frye, Esq.
Attorneys for Defendant
County of Oneida
2219 Genesee St.
Utica, NY 13501

HORIGAN, HORIGAN LAW FIRM — Krishna K. Singh, Esq.
Attorneys for Defendant — Thomas E. Kelly, Esq.
County of Herkimer, New York
P.O. Box 520
49 E. Main St.
Amsterdam, NY 12010

DAVID E. PEEBLES
U.S. Magistrate Judge

REPORT AND RECOMMENDATION

The plaintiffs in this action represent an amalgamation of solid waste collectors, haulers, processors, and disposers, together with United Haulers Association, Inc. — a not-for-profit association whose membership includes such solid waste management companies. Together, they have commenced this action to challenge the constitutionality of flow control laws enacted by Oneida and Herkimer Counties in 1990, as part of an overall waste management program that included creation of the Oneida-Herkimer Solid Waste Management Authority (the "Authority"). In their complaint, plaintiffs allege that the disputed flow control provisions represent an impermissible restraint upon interstate commerce, in contravention of the Commerce Clause of the United States Constitution.

As a result of a decision rendered by the United States Court of Appeals for the Second Circuit in July of 2000, the matter was returned to this Court with instruction that a determination be made as to whether the burdens imposed by the disputed ordinances on interstate commerce are clearly

excessive in relation to the local benefits sought to be achieved by their adoption. The parties have since cross-moved for summary judgment, both arguing that this test — described by the Second Circuit as "fact-intensive" — can be applied as a matter of law, based upon the record now before the court, without the necessity of a trial.[1] In addition, plaintiffs have moved for an order striking two attorneys' affidavits submitted by the defendants in connection with the pending summary judgment motions.

Having analyzed each side's summary judgment motion independently, as I must, I find the existence of genuinely disputed issues of fact, based upon the record now before the court. Those disputed facts, however, are not material to the outcome of the litigation, and accordingly do not stand as a barrier to the entry of summary judgment. I further find that because the record now before the court fails to disclose that the flow control provisions impose burdens on interstate commerce that are qualitatively or quantitatively different from those experienced in relation to intrastate commerce, summary judgment should be entered dismissing plaintiffs' complaint. Finally, although this ruling is not outcome determinative, I find that plaintiffs' arguments in support of their application to strike the affirmation of Michael J. Cahill, Esq. (Dkt. No. 154) and affidavit of Richard A. Frye (Dkt. No. 158) are well taken, and that with minor exception, the contents of those submissions should not be considered.

I. BACKGROUND

Oneida and Herkimer are two contiguous counties located in Central New York, comprising a geographical area

---

[1] As will be seen, in their motion plaintiffs also urge the court to employ a more stringent Commerce Clause test than that embraced by the court of appeals, arguing that facts which have come to light through pretrial discovery require this raising of the bar. *See* pp.16-21, *post*.

in excess of 2600 square miles with a combined population of approximately 306,000, residing in seventy-eight separate municipalities. *United Haulers Ass'n, Inc. v. Oneida Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 248 (2d Cir. 2001). During the 1980s the two counties undertook joint exploration of ways to address what has been described by the defendants as a "solid waste crisis."[2] *United Haulers*, 261 F.3d at 249. Those collaborative efforts of the two counties led ultimately to the creation in 1988 of the Authority, a public benefit corporation operated under N.Y. Public Authorities Law § 2049-aa *et seq.* (McKinney 2000), and empowerment of the Authority to collect, process and dispose of all solid waste generated within the two counties. *United Haulers*, 261 F.3d at 249.

---

[2] According to Ronald N. Soltys, who gave an affidavit in this action in July of 1995 at a time when he chaired that county's legislature, the impetus for Herkimer County's efforts to address waste management issues included concerns over existing landfills and their environmental impact, the lack of any significant recycling efforts within the county, and problems experienced with the dumping of residential household garbage, construction debris and roofing waste along county roads. *See* Singh Aff. (Dkt. No. 159) Exh. A. The genesis of Oneida County's participation was described by one former Oneida County Legislator (now a New York State Supreme Court Justice), Robert Julian, to include concern over the lack of interested participants in the local waste management industry, owing to the fact that one vendor held a competitive advantage by virtue of its ownership of the local landfill utilized for waste disposal. Julian Affidavit, dated July 5, 1995 (Dkt. No. 24), repeated at Defendants' Exhibits Vol. III (Dkt. No. 174) Tab 32 ¶¶ 4-9. The Julian Affidavit also chronicles the same types of solid waste disposal problems which confronted Herkimer County and led lawmakers to take action, as well as concerns over environmental hazards associated with local landfill operations. *Id.* ¶¶ 13-28.

Following its creation, the Authority entered into contracts with Herkimer and Oneida Counties to manage and dispose of the solid waste generated within their respective boundaries. *Id.* To implement those agreements, the two counties enacted flow control provisions which, in essence, require that all solid waste generated within them, whether collected by a municipality or a licensed private hauler, or instead delivered by the generator, be deposited at approved processing sites designated by the Authority.[3] *United Haulers*, 261 F.3d at 249.

The net effect of these flow control provisions and their requirement that any solid waste collected by them within the two counties must be conveyed to processing facilities estab-

---

[3] The Oneida flow control law, passed in December of 1989, provides that

> [i]n order to provide for public health and safety and to facilitate the conservation of vital resources: Each person shall provide for the removal of solid waste and recyclables from the property on which they are generated either through a service provided by a municipality or licensed private hauler or by direct haul by the individual generator to a disposal location approved by the County.

Oneida County Local Law No. 1 of 1990, as cited in *United Haulers*, 261 F.3d at n.1; *see also* Defendants' Exhibits Vol. I (Dkt. No. 167) Exh.13. The Herkimer flow control provision, adopted in February of 1990, is substantially similar, providing that

> [a]fter placement of garbage and of recyclable materials at the roadside or other designated area approved by the Legislature by a person for collection in accordance herewith, such garbage and recyclable material shall be delivered to the appropriate facility designated by the Legislature, or the Authority pursuant to contract with the County.

Herkimer County Local Law No. 1 of 1990, as cited in *United Haulers*, 261 F.3d at n.2; *see also* Defendants' Exhibits Vol. I Dkt. No. 167) Exh. 12.

lished by the Authority is that trash haulers and generators are required to deliver solid waste to those designated central collection points, and to make a per ton payment — often referred to as a "tipping fee" — for all solid waste delivered. *United Haulers*, 261 F.3d at 251. The tipping fee payable to the Authority typically is significantly higher than that charged by privately operated in-state and out-of-state disposal facilities. *Id.* The solid waste delivered to the Authority for processing is then removed and dispensed with by private disposal companies operating under a competitively-bid contract with the Authority. *Id.* at 250-51.

II. PROCEDURAL HISTORY

Plaintiffs commenced this action on April 14, 1995. Dkt. No. 1 Following the joinder of issue by the filing of answers on behalf of Oneida County, the Authority, and the County of Herkimer (Dkt. Nos. 6, 8 and 9, respectively), plaintiffs moved seeking entry of summary judgment. Dkt. Nos. 14-22 (moving papers), 23-29 (opposition), 30-34 (reply). Plaintiffs' motion was granted by an order issued by Circuit Judge Rosemary S. Pooler on March 31, 2000.[4] Dkt. No. 83.

In her decision, Judge Pooler declared the disputed flow control laws to be unconstitutional, and enjoined the defendants from their enforcement. 2000 WL 339551 70, at *4-*6. As a basis for doing so, Judge Pooler first concluded that the laws were discriminatory in that they do not regulate evenhandedly with regard to interstate commerce, instead benefitting a single, local vendor — in this case, the Author-

---

[4] At the time her decision was issued, Judge Pooler, having recently been elevated to the Second Circuit, was sitting as a district judge by designation for purposes of this case. That decision, which is unreported, can be found at No. Civ. A. 95-CV-516, 2000 WL 33955170 (N.D.N.Y. Mar. 31, 2000), and will be cited as such in this Report and Recommendation.

ity — over the plaintiffs and others similarly situated. *Id.*, at *4. Finding the flow control laws at issue to be virtually indistinguishable from those examined and struck down in both the Supreme Court's decision in *C&A Carbon, Inc. v. Town of Clarkstown*, 511 U.S. 383, 114 S. Ct.1677 (1994), and the Second Circuit's decision in *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), Judge Pooler concluded that the disputed flow provisions run afoul of the dormant Commerce Clause, characterizing them as "discriminatory and *per se* invalid."[5] *United Haulers*, 2000 WL 339551, at *4. In making that finding, Judge Pooler concluded as a matter of law, based upon established Supreme Court precedent, that the defendants could not satisfy their shifted burden of demonstrating that the public benefits resulting from the laws outweigh their burdens on interstate commerce, and no less restrictive alternatives exist.[6] *United Haulers*, 2000 WL 33955120, at *5.

An ensuing appeal by the defendants resulted in reversal of the trial court's determination. *United Haulers*, 261 F.3d 245. In its decision vacating the finding of unconstitutionality, the Second Circuit initially expressed respectful disagreement with the district court's threshold determination that trash flow ordinances similar to those at issue are virtually certain to violate the dormant Commerce Clause, recog-

---

[5] The Constitution provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States[.]" U.S. Const. art. I, § 8, cl. 3. Over time, courts have construed the Commerce Clause as limiting a state's power to legislate in areas which affect interstate commerce, giving rise to "dormant" or "negative" limitations associated with the original provision. *Automated Salvage Transport, Inc. v. Wheelabrator Environ. Sys., Inc.*, 155 F.3d 59, 74 (2d Cir. 1994)

[6] In her decision Judge Pooler also rejected a challenge to plaintiffs' standing to attack the trash flow control laws. 2000 WL 33955170, at *5.

nizing the unfairness of depriving the defendants of an opportunity to develop and present evidence that there were no reasonable alternatives to implementing the challenged provisions. *Id.* at 256-57, n.3. More fundamentally, the Second Circuit rejected the notion that the flow control laws at issue were facially discriminatory, and thus *per se* unlawful, distinguishing *Carbone* and its progeny based upon the court of appeals' finding that unlike the legislation at issue in those cases, which differentiated between similarly situated local and out-of-state entities, the regulations involved in this matter favor only the Authority a public entity while all private waste management processors, both in-state and out-of-state, are treated alike. *United Haulers*, 261 F.3d at 258-63. On this basis the court distinguished *Carbone*, and concluded that the appropriate analysis under the dormant Commerce Clause should be based upon *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844 (1970), requiring the trial court to examine the balance between the burdens imposed on interstate commerce as a result of the regulations and the putative local benefits associated with them. *United Haulers*, 261 F.3d at 263-64.

Upon its return to this court the matter was referred to me, initially for the handling of non-dispositive matters, including the implementation of a case management order, and later for the issuance of a report and recommendation regarding the parties' pending cross-motions, pursuant to 28 U.S.C. § 636(b)(1)(B). Dkt. No. 180.

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment is warranted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322,

106 S. Ct. 2548, 2552 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 2509-10 (1986). The moving party has the initial burden of demonstrating that there is no genuine issue of material fact to be decided with respect to any essential element of the nonmoving party's claim. *Anderson*, 477 U.S. at 250 n.4, 106 S. Ct. at 2511 n.4. Once that burden is met, the opposing party must show, through affidavits or otherwise, that there is a material factual issue requiring a trial.[7] Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324, 106 S. Ct. at 2553; *Anderson*, 477 U.S. at 250, 106 S. Ct. at 2511. When deciding a summary judgment motion, the court must resolve any ambiguities and draw all inferences from the facts in a light most favorable to the nonmoving party. *Wright v. Coughlin*, 132 F.3d 133, 137-38 (2d Cir. 1998). Summary judgment is inappropriate where "review of the record reveals sufficient evidence for a rational trier of fact to find in the [non-movant's] favor." *Treglia v. Town of Manlius*, 313 F.3d 713, 719 (2d Cir. 2002) (citation omitted).

Both parties in this fact-intensive matter have sought summary judgment, urging the court to find that all of the material facts necessary to adjudicate the claims in this action have been established, without contradiction, and thus there is no need to conduct a trial in this case.[8]

---

[7] A material fact is genuinely in dispute "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510.

[8] Defendants, by way of example, state in their papers that "[t]he parties have agreed that no relevant or material facts are in dispute, and that cross-motions for summary judgment should be filed . . . ." Defendants' Memorandum of Law In Support of Motion for Summary Judgment (Dkt. No. 155) at 1. Elsewhere in that submission defendants reassert the proposition, observing that "[h]ere, the parties disagree over the legal significance of certain facts, but agree that the record is complete and that summary judgment can

The mere fact that both parties believe that they are entitled to summary judgment, however, does not necessarily obviate the need for a trial in order to resolve disputed issues of material fact. *Schwabenbauer v. Board of Ed. of City Sch. Dist. of City of Olean*, 667 F.2d 305, 313 (2d Cir. 1981). When confronted with cross-motions for summary judgment, a court must consider each motion separately. *I.V. Services of Am., Inc. v. Trustees of Am. Consulting Eng'rs Council Ins. Trust Fund*, 136 F.3d 114, 119 (2d Cir. 1998) (citing and quoting *LaFond v. General Physics Servs. Corp.*, 50 F.3d 165, 171 (2d Cir. 1995)). In such an instance, the court's mission is to "evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Hotel Employees & Rest. Employees Union, Local 100 v. City of New York Dep't of Parks & Recreation*, 311 F.3d 534, 543 (2d Cir. 2002) (citations and internal quotations omitted).

B. Motion To Strike Attorneys' Affidavits

One element of the legal skirmish now confronting the court is a motion by the plaintiffs to strike an affirmation submitted by Michael J. Cahill, Esq., counsel for the Authority (Dkt. No. 154), and an affidavit given by Richard Frye, Esq., the attorney representing Oneida County (Dkt. No. 158), from consideration in connection with the pending cross-motions for summary judgment. As a basis for that request, plaintiffs assert the impropriety of including within those affidavits both factual statements which are not based on personal knowledge and legal argument. Oneida County

---

be granted." *Id.* at 6. Plaintiffs have taken a similar position, noting in their motion papers that "both parties have moved for summary judgment, thus confirming there are no material facts in dispute precluding such relief." Plaintiff's Memorandum of Law in Support of Plaintiff's Cross-motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment (Dkt. No. 163) at 1.

actively opposes that request, asserting that the disputed documents merely discuss and summarize matters already in evidence, and report upon background facts which are well known to the citizenry of Oneida and Herkimer Counties. That defendant therefore asks that the affidavits be considered in this light or, alternatively, that they be treated as legal memoranda.[9]

The rules of this court provide, in pertinent part, that

> [a]n affidavit [given in connection with a motion filed with the court] must not contain legal arguments, but must contain factual and procedural background as appropriate for the motion being made.

N.D.N.Y.L.R. 7.1(a)(2). That rule represents little more than an embodiment of the longstanding custom and practice, particularly as it relates to summary judgment motions, that affidavits presented in support of or opposition to a motion should contain factual assertions made upon personal knowledge, to the exclusion of mere hearsay or legal arguments better reserved for legal memoranda. *DiTullio v. Village of Massena*, 81 F. Supp.2d 397, 403 (N.D.N.Y. 2000) (McAvoy, C.J.) (citing *Hollander v. American Cyanamid Co.*, 172 F.3d 192, 198 (2d Cir.), *cert. denied*, 528 U.S. 965, 120 S. Ct. 399 (1999) and N.D.N.Y.L.R. 7.1(a)(2)); *see also* 10B Wright, Miller & Kane, Federal Practice and Procedure, § 2738 (3d ed. 1998).

A review of the disputed submissions reveals that they exceed the permissible bounds established in accordance with these principles. Paragraph five of the Cahill Affirmation describes its remainder as "intended to discuss the salient facts established (or not established) in discovery, with particular regard to the opinions of the expert witnesses provided by both sides." Cahill Affirmation (Dkt. No. 154) ¶ 5.

---

[9] The docket fails to reflect any papers submitted by the Authority or Herkimer County in opposition to plaintiffs' motion to strike.

As advertised, the matters set forth in the balance of the Cahill Affirmation essentially represent commentary on expert reports and deposition transcripts which are already before the court. Such advocacy is better reserved for inclusion in legal memoranda, which have been submitted to the court in abundant quantity in connection with the pending cross-motions. Paragraphs six through forty-five of the Cahill Affirmation should therefore be stricken.

The Frye Affidavit suffers from similar infirmity. It is true that in offering his affidavit, Attorney Frye lays what could be viewed as a foundation for his ability to comment regarding certain matters, averring that he is a lifetime resident of the county and has practiced law there for forty-five years, including to serve as Oneida County Attorney. Frye Aff. (Dkt. No. 158) ¶ 3. The affidavit goes on, however, to make certain factual representations regarding the history of solid waste collection and disposal in Oneida County, without providing an indication of the specific basis of Attorney Frye's knowledge, and at times becomes opinionated and argumentative. Based upon my review of the Frye Affidavit, I find that its contents, beginning at paragraph five and extending through the end, should not be regarded by the court as evidentiary material, and therefore recommend the striking of those portions of the affidavit.

C. Framing The Issue/Law Of The Case

The question which the court of appeals charged this court to consider on remand, while potentially rife with complex and highly fact-intensive considerations, is quite simply stated. The Second Circuit squarely rejected this court's earlier holding that in light of *Carbone*, the flow control laws at issue should be scrutinized under the stricter test associated with facially discriminatory enactments, which would have required the defendants to justify their actions and establish that no less restrictive alternatives exist, instead concluding that the ordinances should be reviewed under the less rigid

Pike test. *United Haulers*, 261 F.3d at 263-64. That test requires the court to examine and uphold the challenged provisions "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142, 90 S. Ct. at 847.

Despite the higher court's directive, the plaintiffs now urge the court to eschew the *Pike* test in favor of the stricter scrutiny required under *Carbone* and other similar cases. In making this argument plaintiffs do not regard the Second Circuit's decision as binding, in light of the fact that at the time it was rendered discovery had not yet occurred, a factor which in their view makes the law of the case doctrine inapplicable. Plaintiffs further contend that through discovery conducted since the trial court's earlier decision, they have been able to demonstrate the existence of a discriminatory effect resulting from the disputed ordinances sufficient to raise the bar and invoke the *per se* discriminatory test. In support of this argument, plaintiffs assert that because the overall waste management program developed by the counties was designed, in part, to keep and attract employers, it therefore has the discriminatory effect of favoring local businesses over out-of-state competitors. Plaintiffs argue that the Second Circuit did not perceive this potentially discriminatory impact at the time its decision was rendered, since the argument is based upon information subsequently developed through pretrial discovery.

Plaintiffs' request for departure from the seemingly limited task assigned to this court requires an analysis of the Second Circuit's decision and mandate in light of established principles, including those related to law of the case. Generally speaking, law of the case tenets dictate that when a court rules upon an issue, that decision continues to govern the same issues in subsequent stages of that case. *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 7-8 (2d Cir. 1996). Although the doctrine is admittedly discretionary and a court is always free to modify its own pretrial rulings at any time

before it enters a final judgment, based upon jurisprudential principles underlying the law of the case doctrine - including the desire that litigants be able to rely on judicial holdings and adjust their conduct accordingly - courts have steadfastly refused to reexamine issues previously decided in a case absent compelling circumstances, such as an intervening change of controlling law, the introduction of new evidence, or the need to correct a clear error or prevent manifest injustice. *Pescatore*, 97 F.3d at 8; *Doe v. New York City Dept of Soc. Servs.*, 709 F.2d 782, 789 (2d Cir. 1981) (citations omitted), *cert. denied, Catholic Home Bureau v. Doe*, 464 U.S. 864, 104 S. Ct. 195 (1983).

While under law of the case teachings a court retains a certain measure of discretion to revisit its own earlier rulings, provided that in doing so it does no injustice to the desirable end of ensuring predictability and uniformity of results and avoiding needless relitigation of questions already decided, that same flexibility does not empower a district court to avoid the clear dictates of an appellate court mandate when, as is the case in this instance, that mandate "describes the duty of the district court on remand upon receipt of the mandate, which is the appellate court's direction to the trial court[.]" *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001) (internal quotation marks and citation omitted). Upon receipt of such a mandate, the inferior court to which the matter has been remanded is left with no choice but to proceed in accordance with the mandate as well as "such law of the case as was established by the appellate court." *Stagl v. Delta Airlines, Inc.*, 117 F.3d 76, 79 (2d Cir. 1997) (internal quotation marks and citation omitted). Upon review following the issuance of the mandate, the court retains no discretion to consider questions which have been necessarily determined by the appellate court issuing the mandate. *Oneida Indian Nation of New York v. County of Oneida*, 214 F.R.D. 83, 92 (N.D.N.Y. 2003) (McCurn, S.J.).

In this instance the assignment delegated to this court by the Second Circuit's mandate, and the analysis to be now undertaken as a result of that directive, could not be clearer. The mandate provided that the district court's earlier determination and resulting judgment was reversed and remanded "for further proceedings in accordance with the opinion of this Court." Dkt. No. 101. That decision, in turn, specifically held "that the Counties' system does not discriminate against interstate commerce in favor of in-state business interests[.]" *United Haulers*, 261 F.3d at 263. The Second Circuit explained this finding by noting that

> [f]low control regulations like the Oneida-Herkimer ordinances, which negatively impact all private businesses alike, regardless of whether in-state or out-of-state, in favor of a publicly owned facility, are not discriminatory under the dormant Commerce Clause.

Id. Having made that finding the Second Circuit acknowledged temptation to undertake a *Pike* balancing analysis on its own initiative, but resisted the urge and instead remanded to this court with the following crisp and concise directive:

> [W]e reverse and remand for a determination of whether the Counties' flow control laws pass constitutional muster under the *Pike* balancing test.

United Haulers, 261 F.3d at 264.

Given this clear instruction, embodied by reference in the Second Circuit's mandate, this court is duty bound to faithfully comply with that court's narrow and quite specific directive. Accordingly, I recommend rejection of plaintiffs' efforts to reframe the issue, resolution of which has been assigned to this court, and to convince the court to reject the *Pike* balancing test in favor of a more strict scrutiny test.

D. *Pike* Test Analysis

As earlier noted, this court is now tasked with reviewing the record in order to determine whether, when applying the

Pike balancing test, it can discern the existence of any genuinely disputed material issues of fact which would warrant denial of one or both cross-motions, in favor of conducting a trial. Defendants take the position that no reasonable factfinder could conclude that the incidental burdens imposed on interstate commerce by the regulations now under scrutiny are qualitatively or quantitatively different than those imposed on intrastate commerce, and thus there are no incidental burdens against which putative local benefits must be measured. As such, they argue, it is unnecessary for the court to consider the extensive submissions of the parties and engage in the "fact-intensive" balancing under *Pike* contemplated by the Second Circuit in its remand of this case.

The Second Circuit has observed that the "incidental burdens" on interstate commerce of concern in *Pike* "are the burdens on interstate commerce that exceed the burdens on intrastate commerce." *Automated Salvage Transport, Inc.*, 155 F.3d at 75; *see also New York State Trawlers Assn. v. Jorling*, 16 F.3d 1303, 1308 (2d Cir. 1994). As that court has noted,

> [t]hus, the minimum showing required to succeed in a Commerce Clause challenge to a state regulation is that it have a disparate impact on interstate commerce. The fact that it may otherwise affect commerce is not sufficient.

Id. In a case in which the *Pike* balancing test is employed, summary judgment upholding the challenged regulatory measure "is appropriate where no reasonable factfinder could find that the statute's 'incidental burdens on interstate commerce' are clearly excessive in relation to the local benefits." *New York State Trawlers Ass'n*, 16 F.3d at 1308 (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-72, 101 S. Ct. 715, 727-28 (1981)).

In applying *Pike*, the court may consider that waste management falls within the "traditional purview" of municipali-

ties. *United Haulers*, 261 F.3d at 264. Despite plaintiffs' contention to the contrary, it is well-recognized — certainly at least within this circuit — that "[w]aste disposal is both typically and traditionally a local government function." *United Haulers*, 261 F.3d at 264 (Calabresi, J., concurring) (citations omitted); *see also USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1275 (2d Cir. 1995) ("For ninety years, it has been settled law that garbage collection and disposal is a core function of local government in the United States.").

While there is some common ground associated with the parties' positions on these issues, both they and their respective experts seemingly exhibit some disagreement in their analyses of the burdens upon interstate commerce associated with the trash flow regulations at issue.[10]

Mark P. Berkman, plaintiffs' expert, characterizes the designated purposes underlying the disputed trash flow regulations as being consistent with the intent of trash flow laws generally. Defendants' Exhibits Vol. II (Dkt. No. 168) Tab 14 ¶¶ 37, 41. In the face of trends favoring large regional waste processing and disposal facilities and vertically integrated waste collection, processing and disposal operations, according to Dr. Berkman, such trash flow provisions as those now under scrutiny generally lead to "balkanization," with municipalities hoarding waste in an effort to achieve waste disposal self-sufficiency. *Id.* 30.

Although specifics are conspicuously lacking in his report, Dr. Berkman opines that the counties' flow control

---

[10] Not surprisingly, those experts also hold very different views regarding the benefits sought to be achieved by the disputed trash flow regulations. In addition, although this factor is in all likelihood legally irrelevant under *Pike*, the experts also disagree strongly over whether those putative benefits could be realized by implementing less restrictive measures.

laws, while facially affording equal access to solid waste generated within the two counties to both in-state and out-of-state waste collectors, transporters and disposal companies, and excluding all commercial waste processors, in-state and out-of-state, from the market, in reality discourage out-of-state companies from participating on an equal footing. *Id.* ¶ 18. This, Dr. Berkman suggests, is due to the inability of the haulers to take advantage of potential alliances with out-of-state landfills or waste disposal facilities as well as the requirement of a single point of access created by the flow control laws. *Id.* ¶ 19. This, in the estimation of plaintiffs' expert, prevents local haulers, and in turn the consumer, "from benefiting from the highly competitive interstate solid waste disposal market." *Id.*

In view of these trends and the restrictions placed on waste generators and collectors in which waste from the counties must be transported for processing, plaintiffs' expert opines, there is a resulting burden on interstate commerce. *Id.* ¶¶ 16-20. The trash flow ordinances at issue require that all waste collected be taken to centralized processing facilities operated by the Authority. Id. ¶ 16. Without such restrictions, Dr. Berkman notes, trash collected within the counties of Herkimer and Oneida would likely be transported elsewhere for processing, taking advantage of the large interstate market for waste disposal and the trend for large regional waste and processing of disposal facilities. *Id.* ¶¶ 18-20. While recognizing that the current regime does allow for the possibility of transport of waste to disposal sites outside of New York — and in fact that did occur during earlier years — Dr. Berkman attributes this solely to the failure of the two counties to meet their ultimate objective of having the Authority create its own landfill, with the intended effect of removing all non-recyclable waste generated within the two counties from interstate commerce. *Id.* ¶ 17. Dr. Berkman also suggests that given the reality of vertical integration and the demonstrated availability of waste haulers to negoti-

ate agreements which include waste processing components, interstate commerce would be enhanced without the limitation that processing occur at an Authority facility. *Id.* ¶¶ 24-25.

Dr. Berkman characterizes the challenged trash flow ordinances as an inefficient means of achieving the stated goals, and an impediment to the ability to take advantage of the "price discipline" resulting from free competition. *Id.* ¶¶ 17, 37. Dr. Berkman notes that the tipping fees associated with waste collected within the counties are substantially higher than average, a fact he attributes to the current restrictions. *Id.* ¶¶ 37, 45. Dr. Berkman suggests that in light of the Second Circuit's earlier decision in this case, the relevant inquiry requires assessment of the benefits associated with the trash flow provisions, rather than the Authority's entire integrated waste control structure, as well as a determination as to whether those benefits are clearly outweighed by the burdens on interstate commerce. *Id.* ¶ 40. Characterized this way, Dr. Berkman suggests that the answer is obvious, since there are far less restrictive means of financing the work of the Authority. *Id.* ¶ 56.

Dr. Robert N. Stavins, defendants' expert, acknowledges that the trash flow provisions at issue were calculated to ensure sufficient revenues to cover all costs of the Authority's integrated waste disposal system, and further that the tipping fees charged are higher than those typical of facilities which merely engage in collection, processing and disposal of waste in general without being subjected to the requirements associated with a more comprehensive integrated waste management program. Defendants' Exhibits Vol. III (Dkt. No. 169) Tab 17 ¶ 9. He maintains, however, that the trash flow ordinances do not impermissibly differentiate between New York and out-of-state private concerns. *Id.* ¶ 29.

Focusing on the four segments of the industry — generation, collection, processing and disposal — Dr. Stavins con-

cludes that there are minimal, if any, burdens on interstate commerce associated with the provisions at issue. *Id.* ¶¶ 15-19. In terms of generation, according to Dr. Stavins, there is no resulting disparate impact on interstate commerce, since the local laws relate exclusively to waste collected within the counties. *Id.* ¶ 16. The collection portion of the waste management process is open to all interested parties, without regard to their location, and thus there is no theoretical differentiation made between in-state and out-of-state collectors by the flow provisions. *Id.* ¶ 17.

Addressing the processing component, Dr. Stavins points out that the laws require that all non-recyclable waste collected within the county by any party be brought to an Authority transfer station for processing prior to ultimate disposition. *Id.* ¶ 18. This is a requirement which does not affect interstate commerce, instead simply removing all non-recyclable waste generated in the counties from private commerce, without making any distinction between in-state and out-of-state processors. *Id.*

With regard to hauling and the final disposition of the waste, Dr. Stavins recognizes only minimal potential benefit to in-state versus out-of-state interests, based principally upon geographical considerations, including proximity to the source of supply.[11] Defendants' Exhibits Vol. III (Dkt. No. 169) Tab 17 ¶19. Dr. Stavins also notes that the counties' waste management provisions actually encourage interstate commerce, insofar as they relate to recyclable materials. Defendants' Exhibits Vol. III (Dkt. No. 169) Tab 17 ¶19.

---

[11] This potential benefit to local entities is a function of distance, and not necessarily whether a hauler or waste disposer is in-state or out-of-state, though certainly there is some measure of correlation. This potential benefit, however, does not result from the trash flow ordinances now at issue, and would obtain even absent those provisions.

The opinions of the respective experts diverge considerably when considering the possibility that the Authority could one day recognize the objective of developing its own landfill. Plaintiffs' expert notes that historically, publicly operated landfills are more costly and less environmentally compliant than those operated by their private sector counterparts. Defendants' Exhibits Vol. II (Dkt. No. 168) Tab 14 ¶ 48. Dr. Berkman also states the obvious — that the development of a local facility would remove waste from interstate commerce for purposes of disposal, thus by definition favoring a local facility over those existing out of state. *Id.* ¶¶ 17, 46. Dr. Stavins, by contrast, disagrees with this ultimate conclusion, and opines that construction of a waste disposal facility by the Authority would not materially impact upon interstate commerce. Defendants' Exhibits Vol. III (Dkt. No. 169) Tab 17 ¶¶ 30-31.

The lesson of the Second Circuit's earlier decision in this case, as well as *Pike* itself, is that regulatory provisions under scrutiny pass dormant Commerce Clause muster unless they treat out-of-state entities less favorably than similarly situated in-state concerns. While arguing that the Second Circuit, including in *New York State Trawlers Association, Inc.*, has misinterpreted Supreme Court precedent, the plaintiffs do not genuinely challenge this threshold need to establish some incidental burden upon interstate commerce, which in turn requires a showing of some disparity in treatment between in-state and out-of-state interests. See Plaintiffs' Memorandum of Law in Support of Plaintiffs' Cross-Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment (Dkt. No. 163) at 11-12. The critical inquiry, as plaintiffs acknowledge, is whether an out-of-state business is treated less favorably than one similarly situated but within the state. *Id.*

Having engaged in a thorough review of the record, including the most recent submissions of the parties, I fail to discern any disparate impact resulting from the challenged

regulations on interstate commerce. Under the regime now being challenged, a local private trash business is treated no differently than one situated out of state. Any hauler, for example, is permitted to collect solid waste within the counties of Herkimer and Oneida. Similarly, any trash hauler, regardless of location, is entitled to bid on the right to contract for the hauling of waste from transfer stations for disposal, and all private concerns are disqualified, without exception, from the processing phase. Finally, the ordinances place no restriction on the final disposal location for waste hauled from the transfer station', subject to the ultimate goal of establishing an Authority-operated disposal site. While Dr. Berkman notes that the counties' system deprives trash collectors the opportunity to align with disposal companies, and thereby gain competitive advantage, this applies equally to both in-state and non-New York based entities. Simply stated, there is no distinction between treatment of interstate as opposed to intrastate service providers under the disputed regulations.

Unquestionably, the challenged ordinances differentiate between the Authority and private entities which would be positioned to receive and process the solid waste in issue. In the event that the Authority does realize its goal of developing its own disposal site, then the flow control laws will obviously remove solid waste generated in the two counties which otherwise would be available to private, commercial waste disposal companies. The fact that the disputed regulations favor a governmental entity over private interests, however, does not in and of itself violate the dormant Commerce Clause. *Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205, 218 (2d Cir. 2004). Indeed, as the Second Circuit has already made clear in this instance, a flow control ordinance governing the processing of waste is not discriminatory under the Commerce Clause unless it favors local private business interests over out-of-state interests:

> [f]low control regulations like the Oneida-Herkimer ordinances, which negatively impact all private busi-

> nesses alike, regardless of whether in-state or out-of-state, in favor of a publicly owned facility, are not discriminatory under the dormant Commerce Clause.

United Haulers, 261 F.3d at 263. Both the plaintiffs and their expert, Dr. Berkman, apparently acknowledge that the trash flow provisions under scrutiny do not have disparate impact upon out-of-state private entities, as compared to those located within New York. Defendants' Exhibits Vol. I (Dkt. No. 167) Tab 7 (Plaintiff's Supplemental Response to Defendants' Third Set of Interrogatories) No. 3; Defendants' Exhibits Vol. II (Dkt. No. 168) Tab 16 at 67-71, 211.

Demonstrating admirable creativity in their advocacy, plaintiffs point to legislative history suggesting that the disputed regulations were motivated, at least in part, by a desire on the part of local county officials to provide effective waste removal as a means of enhancing the local business climate in order to keep existing employees from relocating elsewhere, and attracting new businesses into the area. This, they argue, represents the sort of protectionism condemned under dormant Commerce Clause jurisprudence. Plaintiffs' Memorandum of Law in Support of Plaintiffs' Cross-Motion for Partial Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment. Dkt. No. 163, at 5-6.

The cases striking down such protectionist measures, however, typically focus on those enactments which directly regulate a particular industry and favor local businesses operating within that industry, to the detriment of out-of-state, but otherwise similarly situated, entities. *See, e.g., Carbone*, 511 U.S. at 387-94, 114 S. Ct. at 1680-84. The present circumstance, involving efforts by municipal officials to create a favorable environment for local businesses and residents, represents an entirely different situation. By enacting laws forming the underpinning of comprehensive solid waste reform, local government officials were performing the very function with which they are charged — to provide govern-

mental services for the citizenry, in this case obviously driven at least in part by a legitimate desire to provide a business-friendly atmosphere designed to attract industry and provide jobs in the community. While such a measure is clearly "protectionist" to the extent that it seeks to prevent erosion of the local business community, it does not represent the type of regulation proscribed by the Commerce Clause and addressed by the line of cases upon which plaintiffs rely.

The trash flow ordinances at issue in this case also do not bear the trappings of legislation which, though facially neutral, is designed to serve the interests of the sort of protectionism which the framers sought to avoid by enactment of the Commerce Clause. This is a factor which readily distinguishes the present situation from that presented in such cases as *Atlantic Prince, Ltd. v. Jorling*, 710 F. Supp. 893 (E.D.N.Y. 1989). In that action, one of several reported cases involving the right to engage in offshore fishing for squid and other species in coastal waters off of New York and nearby states, the court struck down a facially neutral requirement limiting vessels engaged in commercial fishing in New York's waters to a length of ninety feet or less. *Atlantic Prince*, 710 F. Supp. at 894. The basis for doing so was the court's finding that while the statute was neutral in its wording, the unabashed intention of lawmakers in adopting the requirement was to protect the New York commercial fishing industry, which at the time of enactment had at most one commercial fishing vessel exceeding ninety feet in length, to the exclusion of several out-of-state commercial fishing boats over ninety feet in length which had applied for licenses to fish in New York waters. *Id.* at 897. Given the district court's observation that the "case may present one of those 'rare instance[s] where a state artlessly discloses an avowed purpose to discriminate against interstate goods[,]" the court in *Atlantic Prince* found that the law discriminated with respect to interstate commerce, and enjoined its en-

forcement.[12] *Atlantic Prince*, 710 F. Supp. at 901. In this case, by contrast, there is no evidence in the record to suggest that by enacting the trash flow ordinances at issue and the broader waste management regime which led to those ordinances and creation of the Authority, the legislative bodies of Herkimer and Oneida Counties were motivated by a desire to protect local, in-state commercial waste management companies to the detriment of similarly situated, out-of-state concerns. *Atlantic Prince* and similar cases thus provide no basis to set aside the trash flow ordinances now at issue.

Having searched the record, without success, to find any evidence of a quantitative or qualitative difference in the burdens placed by the challenged ordinances on interstate and intrastate commerce, I conclude that there is no violation of the dormant Commerce Clause, and the court therefore need not proceed to the next step of balancing the burdens against the putative benefits associated with the legislation.[13]

---

[12] In *Davrod Corp. v. Coates*, the First Circuit endorsed the district court's analysis of Atlantic Prince and distinguished the somewhat similar circumstances before it by finding that the "heavy discriminatory footprints" left in the legislative history in the New York statute were not present in the Massachusetts legislation. 971 F.2d 778, 789-90 (1st Cir. 1992).

[13] In support of their argument that the *Pike* test favors the finding that flow control laws are unconstitutional, plaintiffs place considerable emphasis upon the alternatives which exist to achieve the ends cited by the counties as providing the rationale for the "hoarding" effect of those ordinances. *See* Plaintiff's Reply Memorandum (Dkt. No. 166) at 8. While consideration of alternatives does not appear to be directly relevant under the *Pike* test, the Second Circuit did intimate in its decision in this case that consideration of "specific alternatives, if any, available to the locality, based on its unique geographical, practical and historical characteristics" could potentially be appropriate. *United Haulers*, 261 F.3d at 256 n.3. That finding, however, appears to have been directed to the perceived premature disposal of the case by the district court under

Freedom Holdings Inc., 357 F.3d at 217-18 (citing *National Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 109 (2d Cir. 2001)).

Given the conviction with which the Second Circuit spoke in its decision in this case regarding the lack of a showing of any disparity in treatment of in-state and out-of-state private concerns under the challenged flow control laws, and considered in light of other decisions from that court including the more recent opinion in *Freedom Holdings, Inc.*, it is at least slightly perplexing that the appellate court did not remand the matter with a directed finding that as a matter of law, the disputed flow control ordinances are not unconstitutional. The language of that court's opinion, however, suggests its strong belief that this was the result which ultimately would obtain upon remand.[14] Based upon my careful review of the record, I now recommend a finding that no reasonable factfinder could determine that the burden imposed in interstate commerce by those regulations is "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142, 90 S. Ct. at 847.

---

the more harsh *per se* invalidity test under *Carbone*, and was seemingly rendered academic by its later finding that the ordinances at issue should be evaluated utilizing a *Pike* test analysis.

[14] As was noted earlier, in its decision the Second Circuit expressed temptation to engage in the *Pike* balancing test itself without remanding the matter to this court for consideration of that issue in the first instance, but in the end resisted. *United Haulers*, 261 F.3d at 263-64. Both the majority and concurring opinions in the case, however, strongly suggest that court's inclination to find, in deference to the belief that "[w]aste disposal is both typically and traditionally a local government function", that the ordinances pass muster under *Pike*. See *United Haulers*, 261 F.3d at 264 (Calebresi, J. concurring). This view is fortified by the Second Circuit's recent characterization of its decision in this case as "upholding" the disputed ordinances. *See Freedom Holdings Inc.*, 315 F.3d at 219 (citing *United Haulers*, 261 F.3d at 262).

IV. SUMMARY AND RECOMMENDATION

This action involves performance by a municipal authority of a function traditionally carried out by municipalities — the collection and disposal of solid waste. In their complaint, the plaintiffs have challenged a measure, which serves as one component of a wholly integrated waste management scheme, requiring that all non-recyclable solid waste collected by any trash hauler, private or municipal, within the Counties of Herkimer and Oneida be taken to a central location for processing and redistribution, and then hauled by a contract vendor to the ultimate' disposal site, which until the Authority recognizes its goal of operating its own disposal site, can be one of the vendor's choosing. Because the challenged ordinances, from an interstate commerce point of view, are facially neutral in their impact, in that they do not affect similarly situated in-State business concerns materially differently from those out of State, I find that it does not run afoul of the dormant Commerce Clause.

Analyzing, as I must, the parties' cross-motions independently, and in each instance resolving all ambiguities and drawing all inferences in favor of the opposing party, I find no basis upon which a reasonable factfinder could conclude that the ordinances now under scrutiny impose burdens on interstate commerce that exceed those placed on intrastate commerce. Accordingly, there is no need to weigh any such individual burdens against putative benefits resulting from flow control provisions, and a finding as a matter of law that they pass muster under the Pike test is warranted. Accordingly, it is hereby

RECOMMENDED that defendants' motion for summary judgment dismissing plaintiffs' complaint (Dkt. No. 152-1) be GRANTED; and it is further

RECOMMENDED that plaintiffs' motion for partial summary judgment on the issue of liability (Dkt. No. 145-1) be DENIED; and it is further

RECOMMENDED that plaintiffs' cross-motion for partial summary judgment on the issue of liability (Dkt. No. 160-1) be DENIED; and it is further hereby

RECOMMENDED that plaintiffs' motion to strike the Affirmation of Michael J. Cahill, Esq., and Affidavit of Richard H. Frye (Dkt. No. 145-1) be GRANTED in part, and that paragraphs five through forty-five of the Cahill Affirmation, and paragraphs five through twenty-five of the Frye Affidavit, be STRICKEN from the record.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1), the parties may lodge written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court within ten (10) days. FAILURE TO SO OBJECT TO THIS REPORT WILL PRECLUDE APPELLATE REVIEW. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(e), 72; *Roland v. Racette*, 984 F.2d 85 (2d Cir. 1993).

IT IS FURTHER ORDERED, that the Clerk of the Court serve a copy of this Report and Recommendation upon the parties electronically.

/S/ DAVID E. PEEBLES
David E. Peebles
U.S. Magistrate Judge

Dated: March 17, 2004
Syracuse, NY

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED HAULERS ASSOC., INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC. and INGERSOLL PICKUP, INC.,

Plaintiffs,

-v.-

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA and COUNTY OF HERKIMER,

Defendants.

Civil Action No. 95-CV-516

APPEARANCES:	OF COUNSEL:
YOUNG & RITZENBERG Attorneys for Plaintiffs Executive Woods Three Atrium Drive Albany, New York 12205	Kevin M. Young, Esq. Kristin Carter Rowe, Esq.
RAYHILL BANKERT & RAYHILL Attorneys for Defendant Oneida-Herkimer Solid Waste Management Authority P.O. Box 156 5 Paris Road New Hartford, New York 13413	Philip A. Rayhill, Esq.
SMITH, SOVIK, KENDRICK & SUGNET, P.C. Attorneys for Defendant County	James A. O'Shea, Esq.

of Oneida
250 South Clinton Street
Suite 600
Syracuse, New York 13202-1252

HORIGAN, HORIGAN, PENNOCK & LOMBARDO, P.C.
Attorneys for Defendant
County of Herkimer
P.O. Box 520
49 East Main Street
Amsterdam, New York 12010

Carrie McLoughlin Noll, Esq.
Thomas E. Kelly, Esq.

ROSEMARY S. POOLER, C.J.*

MEMORANDUM-DECISION AND ORDER

Plaintiffs United Haulers Association, et. al (collectively, the "Haulers") brought this lawsuit against defendants Oneida-Herkimer Solid Waste Management Authority (the "Authority") and Oneida and Herkimer Counties to challenge the laws defendants enacted to manage disposal of local solid waste, known as flow control. Plaintiffs claim that the flow control laws violate the U.S. Constitution's commerce clause because they restrict interstate trade in solid waste and waste disposal services. Defendants argue that their comprehensive waste management system, of which flow control is one part, is a necessary public service.

BACKGROUND

During the 1980s, Oneida and Herkimer Counties commissioned several professional studies and conducted a series of public and legislative hearings and debates in order to

---

* Rosemary S. Pooler, United States Court of Appeals Judge for the Second Circuit, sitting by designation as a United States District Court Judge for the Northern District of New York.

fashion a solid waste management plan. Their efforts culminated in a request to the New York state legislature to pass the Oneida-Herkimer Solid Waste Management Authority Act, which was effective on September 1, 1998. The Act created the public benefit corporation Oneida-Herkimer Solid Waste Management Authority. N.Y. Pub. Auth. L. §§ 2049-aa, *et. seq.* (McKinney 2000).

According to defendants, the Authority "is a public body which has functioned at all material times as an instrument of the Counties in the administration of local solid waste management policy." Def.'s Statement of Material Facts, Dkt. No. 21, ¶ 8. Specifically, the Authority has the power to collect, transport, process and dispose of solid waste; to plan, develop and construct waste management projects; to contract with Oneida and Herkimer regarding waste management; to issues regulations and set and collect fees related to waste management projects; and to borrow money and issue bonds. See N.Y. Pub. Auth. L. § 2049-ee. The Authority also has the power to enter contracts with the counties concerning, among other things, flow control, and the counties have the power to pass flow control ordinances. Id. § 2049-tt.

In May 1989 and December 1989, Oneida, Herkimer and the Authority entered contracts concerning solid waste management. Aff. of Kristin Carter Rowe, Esq., Dkt. No. 15, Exs. F & G. The contracts required the Authority to purchase or lease existing county facilities, which included an incinerator in Rome, a recycling center in Utica, and a recycling center in Ilion; to operate the existing facilities; to develop future facilities; and to issue rules and regulations concerning facilities' operations. Oneida and Herkimer agreed to deliver "all solid waste originated or brought within their respective jurisdictions to the transfer station or stations or other facility designated by the Authority." Id. Ex. F, § 205. The May 1989 contract permitted the Authority to charge tipping and user fees to fund the purchase, construc-

tion and operation of waste management facilities. Under the December 1989 contract, the Authority agreed to issue and sell bonds to fund the study and implementation of a solid waste management plan for Oneida and Herkimer, and the counties agreed to pay any shortfall between the Authority's operating expenses and revenues. Id. Ex. G, §§ 3.03, 5.01, 5.02.

In December 1989, Oneida passed its flow control ordinance, and Herkimer followed suit in February 1990. Rowe Aff., Dkt. No. 15, Exs. B & C. In relevant part, the Oneida ordinance states that "solid waste and recyclables shall be delivered to the appropriate facility, entity or person responsible for disposition designated by the County or by the Authority pursuant to contract with the [County]." Id. Ex. B § 2(d). The Oneida law requires all haulers to obtain a permit from the Authority, and the law states that construction debris, green waste, commercial and industrial waste, and hazardous waste shall be delivered to designated facilities. Penalties for noncompliance include permit revocation, fines up to $5,000, and up to 30 days in jail. Id. Ex. B, § 12(b). The Herkimer ordinance is nearly identical to the Oneida law, although the Herkimer law caps fines at $2,000. Id. Ex. C, §§ 2(c), 13(a).

The Authority itself issued rules and regulations for its facilities, which include an ash landfill, an incinerator, a green waste compost facility, a household hazardous waste collection site, a recycling center and a transfer station. Aff. of Hans G. Arnold, Dkt. No. 25, Ex. A-7. Most importantly, the regulations state that "[h]aulers must deliver all acceptable solid waste and curbside collected recyclables generated within Oneida and Herkimer Counties to an Authority designated facility." Id. § 8. The regulations also require all haulers to obtain and comply with permits that the Authority issues or face penalties including permit revocation, fines up to $5,000, and up to 30 days imprisonment. Id. at §§ 1, 8-9. The permits incorporate Authority regulations.

With the various contracts, local ordinances, and regulations in place, the Authority issued $42.8 million in revenue bonds in March 1990 to fund the purchase and construction of waste management facilities. Rowe Aff., Dkt. No. 15, Ex. H. The Authority issued $8.1 million in revenue bonds in November 1991 to, among other things, finance a transfer station in Utica. Id. In 1992, the Authority redeemed its outstanding bonds with proceeds from a new bond issue of $50.5 million. Id. The Authority has enforced flow control in the counties and in 1995 charged a tipping fee for solid waste of $86 per ton. Id. ¶ 23. According to plaintiffs, they could dispose of the same solid waste at various New York and out-of-state landfills at tipping fees ranging from $40 to $70 per ton.[1] See, e.g., Aff. of David N. Levitt, Dkt. No. 16, at ¶ 10; Aff. of Jeff Bliss, Dkt. No. 17, at ¶ 11. Plaintiffs estimate that the economic impact of the solid waste trade in Oneida and Herkimer Counties in 1995 was approximately $30.9 million, which is the product of 359,890 tons of waste and the $86 per ton tipping fee. See Rowe Aff., Dkt. No. 15, at ¶ 32.

Plaintiffs filed their complaint in federal court on April 14, 1995. Compl., Dkt. No. 1. In their first cause of action, the Haulers claim that defendants' flow control laws violate the Constitution's commerce clause because the laws discriminate against interstate commerce. Compl. ¶¶ 73-86.

---

[1] Defendants state that the Haulers operate pursuant to contracts they signed with individual municipalities or residents. According to defendants, these contracts "establish that plaintiffs do not absorb any of the tipping fees or other disposal costs charged by the Authority," which the Haulers pass through to their customers, and "that plaintiffs are not in fact authorized by their customers to dispose of non-recyclable waste at facilities other than those operated by the Authority." Def.'s Statement of Material Facts, Dkt. No. 21, ¶ 19. These contracts are not in the record, and their relevance, if any, is limited to damages.

Plaintiffs seek declaratory relief and a permanent injunction preventing defendants from enforcing flow control laws. In their second cause of action, the Haulers claim damages under Section 1983, 42 U.S.C. § 1983, because defendants violated their constitutional rights. Compl. ¶¶ 87-95. The Haulers state that they suffered damages as a result of "excessive tipping and disposal fees and the costs and attorneys' fees incurred in this action." Compl. ¶ 95. Defendants filed their answers to the complaint on June 15 and 16 of 1995. Dkt. Nos. 8, 9. The parties have conducted no discovery.[2] By notice of motion, the Haulers sought summary judgment. While decision on the summary judgment motion was pending, I denied plaintiffs' motion for a temporary restraining order. See Dkt. No. 71.

DISCUSSION

I. Summary judgment standard

Summary judgment shall enter if, when viewing the evidence in the light most favorable to the nonmovant, the court determines that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 456 (1992). A party seeking summary judgment must demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the movant satisfies this initial burden, then the burden shifts to the nonmovant to proffer evidence demonstrating that a trial is required because a disputed issue of fact exists. Weg. v. Macchiarola, 995 F.2d 15, 18 (2d Cir. 1993). The nonmovant must do more than present evidence that is merely colorable, conclusory, or speculative and must present "concrete evidence from which a reasonable juror

---

[2] The magistrate judge assigned to this matter stayed discovery pending decision on the summary judgment motion. See Dkt. No. 58.

could return a verdict in his favor ...." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The nonmovant must do more than show "some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

II. Commerce Clause

The legal analysis required to determine whether defendants' flow control laws violate the commerce clause is well settled in light of several Second Circuit decisions following the Supreme Court's examination of the same issue in C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994). While the commerce clause permits Congress to act affirmatively in regulating interstate commerce, the so-called dormant commerce clause "prohibit[s] the states, in the absence of specific congressional authorization, from regulating interstate commerce." Incorporated Village of Rockville Centre v. Town of Hempstead, 196 F.3d 395, 398 (2d Cir. 1999). A state's "actions are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow." Carbone, 511 U.S. at 389.

A. Legal Standard

The court first must decide whether the state is regulating the market or participating in it. See Sal Tinnerello & Sons v. Town of Stonington, 141 F.3d 46, 55 (2d Cir.), cert. denied, 525 U.S. 923 (1998). Participating in the market typically means that the state is "buying or selling goods as any private economic actor might." USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272, 1281 (2d Cir. 1995). No commerce clause violation exists in the case of market participation. See Sal Tinnerello, 141 F.3d at 55. Regulating the market generally means that a state is exercising its governmental powers in methods unavailable to private parties. See SSC Corp. v. Town of Smithtown, 66 F.3d 502, 512 (2d Cir. 1995). Classic hallmarks of government regulation are the threatened imposition of fines and/or jail terms to compel

behavior. See id. If the state is regulating interstate commerce, then the court next must decide whether the regulation (1) is even-handed with only incidental effects on interstate commerce; or (2) discriminates against interstate commerce. See USA Recycling, 66 F.3d at 1281 (quotation and citation omitted). See also Sal Tinnerello, 141 F.3d at 55.

An even-handed, or nondiscriminatory regulation has only "incidental effects on interstate commerce" and is valid "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." USA Recycling, 66 F.3d at 1281 (quotations and citations omitted). In contrast, a discriminatory regulation is "virtually per se invalid," and courts strictly scrutinize it. See Gary D. Peake Excavating Inc. v. Town Bd. of the Town of Hancock, 93 F.3d 68, 74 (2d Cir. 1996) (quotation omitted). A discriminatory regulation entails "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." USA Recycling, 66 F.3d at 1281 (quotation and citation omitted). In other words, the invalid regulation "discriminates against commerce by treating in-state interests preferentially." Sal Tinnerello, 141 F.3d at 55.

In order to prevail, plaintiffs must show either that (1) the flow control laws are discriminatory; or (2) the flow control laws place a burden on interstate commerce clearly excessive in relation to the claimed local benefits. See USA Recycling, 66 F.3d at 1281-82. If plaintiffs prove that a regulation is discriminatory, "the burden shifts to the state or local government to show that the local benefits of the statute outweigh its discriminatory effects, and that the state or municipality lacked a nondiscriminatory alternative that could have adequately protected the relevant local interests." Id.

B. Application of Standard

The local laws that Oneida and Herkimer Counties enacted require all commercial haulers to deliver solid waste they collect within the counties to facilities that the counties or the Authority designate, which are the facilities that the Authority owns and operates. These flow control laws are virtually indistinguishable from the laws examined and struck down in both Carbone and SSC Corp. See Carbone, 511 U.S. at 386; see also SSC Corp., 66 F.3d at 505. As the Second Circuit recently summarized those holdings, "[t]he ordinances in Carbone and SSC Corp. were found to be discriminatory because they required all waste within the town to be disposed of at the one favored local facility, to the exclusion of out-of-state competitors." Gary D. Peake, 93 F.3d at 75. Courts have considered it almost a foregone conclusion that flow control laws violate the dormant commerce clause. See Sal Tinnerello, 141 F.3d at 56 (summarizing SSC Corp. holding striking down flow control law); Rockville Centre, 196 F.3d at 397 (noting that defendant town conceded and district court agreed that flow control ordinance was unconstitutional under Carbone); Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc., 155 F.3d 59, 75 (2d Cir. 1998) (summarizing Carbone holding striking down flow control laws); USA Recycling, 66 F.3d at 1278 (noting that defendant town stopped enforcing its flow control ordinance in light of Carbone). All of these cases determined that flow control ordinances were discriminatory. I accordingly conclude that the flow control laws in Oneida and Herkimer Counties also violate the dormant commerce clause. The laws are discriminatory and per se invalid. As explained more fully below, defendants offered no evidence to meet their burden justifying the ordinances, and the Supreme Court has rejected as a matter of law the arguments they raise on this point. Summary judgment in favor of plaintiffs therefore is appropriate.

In their opposition papers, defendants argue preliminarily that plaintiffs lack standing to challenge the flow control laws because they are in the business of collecting and hauling waste rather than disposing of it. Defendants claim that plaintiffs have no legitimate expectation to take the waste to out-of-state facilities. This argument ignores the fact that the Haulers suffer injury when they pay higher tipping fees at the Authority facilities than they would at other plants. Moreover, many of the relevant cases featured haulers as plaintiffs challenging various aspects of flow control, and all of these haulers had standing in federal court. See Automated Salvage Transp., 155 F.3d at 66; Sal Tinnerello, 141 F.3d at 51; SSC Corp., 66 F.3d at 507; USA Recycling, 66 F.3d at 1279-80. Finally, as discussed in part III of this opinion, while the United Haulers Association, Inc. does not have standing to pursue a claim under 42 U.S.C. § 1983, it does have standing under the Declaratory Judgment Act cause of action. See American Charities for Reasonable Fundraising Regulation, Inc. v. Shiffrin, 46 F. Supp. 2d 143, 153 (D. Conn. 1999) (granting defendants' motion to dismiss plaintiff organization from Section 1983 cause of action but leaving intact organization's request for declaratory relief), aff'd, 2000 WL 232656 (2d Cir. Feb. 25, 2000).

Defendants argue that summary judgment is inappropriate because they are entitled to discovery regarding the discriminatory effects of flow control on interstate commerce and the lack of a nondiscriminatory alternative to flow control, which concern their burden under the strict scrutiny test outlined above. Defendants also contend that they are entitled to discovery concerning the history of the counties' solid waste management efforts, purpose of flow control, and materials disposed of within the counties. To the extent that any factual issues exist, they are not material to my decision regarding the constitutionality of the flow control laws. The laws and regulations speak for themselves and are not disputed. The discriminatory effects of flow control also are a

settled matter of law after the Supreme Court's decision in Carbone, and defendants offer no new arguments on this point. See Carbone, 511 U.S. at 391-92. The Supreme Court also rejected as a matter of law defendants' arguments that no less restrictive alternative to flow control exists or that the public benefits of the laws outweigh a burden on interstate commerce. See id. at 392-93. The remaining issues defendants raise are wholly irrelevant to my analysis. Defendants' plea for discovery therefore is unavailing.

Defendants also contend that their legislation is not like the unconstitutional flow control laws because it is an inextricable part of a public waste management system for the local management of local waste. As noted above, however, the relevant case law consistently has extracted flow control laws as an improper element of general waste management schemes. See, e.g., Rockville Centre, 196 F.3d at 397. Defendants argue that their waste management system is like the scheme that the Second Circuit approved in USA Recycling, where the town assumed exclusive responsibility for garbage collection and disposal. See USA Recycling, 66 F.3d at 1283. What defendants ignore, however, is that the defendant town in USA Recycling stopped enforcing its illegal flow control ordinance, which Oneida and Herkimer counties have not done. See id. at 1278. Nor have the counties entirely eliminated the private market for garbage collection services, which the local government did in USA Recycling. The counties only have taken over disposal and ordered all local private haulers to purchase that service from the counties and the Authority. In other words, the counties impermissibly act "as a business selling to a captive consumer base." Id. at 1283. Defendants argue that they merely have restructured the private collection market and prohibited haulers from crossing over into the disposal market, but the flow control laws dictate where the haulers must bring local solid waste and at what price. Although defendants contend repeatedly that their system treats all parties alike with re-

spect to disposal services, what they actually are doing is hoarding all local solid waste for the benefit of a preferred local disposal facility. See Carbone, 511 U.S. at 392. Consequently, I find based on undisputed facts that the flow control laws are unconstitutional because they discriminate against interstate commerce.

C. Remedy

Because the flow control laws violate the commerce clause, defendants are enjoined from enforcing them. The parties at this stage of the proceedings have not addressed the issue of damages, which may involve complex assessments of lost profit and lost business opportunities that the plaintiffs incurred over a period of years. Defendants contend that the Haulers passed on their increased costs from higher tipping fees to their municipal and residential customers, but there is no evidence in the record to support this claim. See Def.'s Statement of Material Facts, Dkt. No. 21, ¶ 19. I therefore refer this matter to the magistrate judge solely for assessment and calculation of damages. The magistrate judge is free to take evidence in whatever form he or she deems appropriate. I do not express any view regarding whether a limitation on damages is appropriate.

III. Section 1983

The Haulers also brought a cause of action pursuant to 42 U.S.C. § 1983, claiming that defendants deprived them of the right to freely engage in interstate commerce by enacting and enforcing flow control.[3] Defendants' primary argument re-

---

[3] The statute provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

garding this claim concerns not its merits but the alleged need for discovery on the issue of plaintiffs' standing.[4]

Plaintiffs can sue local governments directly under Section 1983 "for monetary, declaratory, or injunctive relief where... the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers." Monell v. Department of Soc. Servs., 436 U.S. 658, 690 (1978). Violations of the commerce clause fall within the scope of Section 1983. Dennis v. Higgins, 498 U.S. 439, 446 (1991). The commerce clause confers a right on plaintiffs "to engage in interstate trade free from restrictive state regulation." Id. at 448. Cf. Valley Disposal, Inc. v. Central Vermont Solid Waste Management Dist., 31 F.3d 89, 102 (2d Cir. 1994) (allowing plaintiffs to pursue Section 1983 claim challenging flow control laws as violating dormant commerce clause). As noted above, defendants violated the dormant commerce clause as a matter of law when they enacted flow control laws. Defendants do not dispute that the counties and public benefit corporation Authority are state actors. Defendants do not enjoy immunity from suit because they are municipalities whose policies caused a constitutional injury. See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 166 (1993).

Defendants contend only that the Haulers, specifically the United Haulers Association, Inc., failed to demonstrate standing because the association has not (1) identified its members

---

shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

[4] Defendants also argue that the Section 1983 claim is without merit because plaintiffs failed to establish a commerce clause violation. Obviously, I disagree.

or explained its purpose; or (2) explained the nature of its members' injuries or linked the injuries to its purposes. Although I do not adopt defendants' arguments, I agree that the association lacks standing only with respect to the Section 1983 cause of action. The Second Circuit "has restricted organizational standing under § 1983 by interpreting the rights it secures to be personal to those purportedly injured." League of Women Voters of Nassau County v. Nassau County Bd. of Supervisors, 737 F.2d 155, 160 (2d Cir. 1984); see also American Charities, 46 F. Supp. 2d at 152-53.[5] The association therefore may not sue under Section 1983 to secure the interstate commerce rights of its members. As noted in part II of this opinion, the association does have standing to pursue its claim under the Declaratory Judgment Act. The named plaintiffs have standing under Section 1983 because the interstate commerce rights that defendants violated are personal to these parties. Finally, plaintiffs note correctly that damages are not an element of the Section 1983 claim, and while the association itself cannot collect damages, the individual named plaintiffs may. See Warth v. Seldin, 422 U.S. 490, 515-16 (1975). I refer this matter to the magistrate judge to determine what, if any, damages and attorneys' fees are warranted.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for summary judgment on their first cause of action is granted and defendants are enjoined from enforcing flow control laws as described in this opinion. The United Haulers Association, Inc. lacks standing only with respect to the claim under Section 1983, but I grant the remaining plaintiffs summary judgment

---

[5] Plaintiffs do not argue that they have standing under the exception that the Second Circuit identified for organizations asserting a violation of the right to associate. See League of Woman Voters, 737 F. 2d at 161.

on that second cause of action. This matter is referred to the magistrate judge for calculation of damages, which may require the solicitation of additional evidence from the parties.

IT IS SO ORDERED.

Dated: March 31, 2000
Syracuse, New York

/s/ ROSEMARY S. POOLER
Designated District Court Judge

APPENDIX F

ONEIDA COUNTY BOARD OF LEGISLATORS

RESOLUTION NO. 301

INTRODUCED BY: MESSRS. JULIAN, HARTWELL, CREASER, HERTLINE

2ND BY: MR. KELLY

LOCAL LAW INTRODUCTORY "I" OF 1989

LOCAL LAW NO. 1 OF 1990

RE: LOCAL LAW FOR THE COLLECTION AND DISPOSITION OF SOLID WASTE INCLUDING GARBAGE, RECYCLABLES, CONSTRUCTION AND DEMOLITION DEBRIS, APPLIANCES, FURNISHINGS, GREEN WASTE, HOUSEHOLD HAZARDOUS WASTE, FARM HAZARDOUS WASTE AND INFECTIOUS WASTE, AND FOR THE PROHIBITION OF THE DISPOSAL OF ANY WASTE MATERIALS IN ANY MANNER EXCEPT AS SET FORTH IN THE LAW.

Section 1. Definitions.

As used in this local law, the following terms shall have the following meanings:

(a) "Authority" means the Oneida-Herkimer Solid Waste Management Authority.

(b) "Board" means the Oneida County Board of Legislators.

(c) "Commercial" means any person, company, partnership, municipality or other entity providing a public service or engaged in a business for profit.

(d) "Commercial and Industrial Waste" shall include all non-hazardous and non-toxic solid wastes generated by

commercial and industrial sources exclusive of commercial and industrial by-products.

(e) "Construction and Demolition Debris" means solid waste resulting from construction, remodeling, repair and demolition of structures, road building, and land clearing. Such wastes include but are not limited to bricks, concrete and other masonry materials, soil, rock, lumber, road spoils, paving material, and tree and brush stumps.

(f) "County" means the County of Oneida.

(g) "Farm Hazardous Waste" shall mean pesticides and/or pesticide residue, and all containers containing the same which are or will no longer be utilized for farm purposes.

(h) "Green Waste" shall mean grass clippings, leaves and cuttings from shrubs, hedges and trees, and garden debris.

(i) "Household Garbage" means putrescible solid waste, including animal and vegetable waste resulting from the handling, storage, sale, preparation, cooking or serving of foods. Household garbage originates primarily in home kitchens, stores, markets, restaurants, and other places where food is stored, prepared or served.

(j) "Household Hazardous Wastes" are exempt from State and Federal regulations; for the purpose of this local law, household hazardous waste shall include pesticides, pesticide residue, and all containers containing the same, used motor oil and automobile batteries.

(k) "Household Metals" shall mean any empty metal food containers including aluminum, bimetal and steel cans.

(l) "Infectious Waste" shall be as defined in 6 NYCRR Part 360 as amended.

(m)"Large Household Furnishings" shall mean all other large and/or bulky articles actually used in the home and

which equip it for living (as chairs, sofas, tables, beds, carpets, etc.)

(n) "Major Appliances" shall mean a large and/or bulky household mechanism (as a refrigerator, washer, dryer, stove, etc.) ordinarily operated by gas or electric current.

(o) "Municipality(ies)" means any village, town or city in the County.

(p) "Person" shall mean any individual head of household, landlord, chief executive officer, owner or manager of a commercial or industrial establishment.

(q) "Recyclable Commercial and Industrial By-products" shall include all materials which are a by-product of production utilized in production or sale after sale by a commercial enterprise or industrial enterprise.

(r) "Recyclable Material(s)" means any material which, under any applicable law, is not hazardous and which may be separated from the waste stream and held for its material recycling or reuse value.

(s) "Recyclables" means any material designated, from time to time, by the County or the Authority pursuant to contract with the County which, under any applicable law or regulation, is not hazardous and which is separated from the waste stream and held for its material recycling or reuse value.

(t) "Recyclers" shall mean those who deal with recyclable material, including but not limited to, collectors, separators and marketers. This definition shall include not-for-profit corporations and charitable corporations which collect recyclables for fund raising purposes.

(u) "Solid Waste" means all putrescible and non-putrescible solid wastes, including, but not limited to, materials or substances discarded or rejected as being spent, useless, worthless, or in excess to the owners at the time of such

discard or rejection, or are being accumulated, stored, or physically, chemically or biologically treated prior to being discarded or rejected, having served their intended use, or as a manufacturing by-product, including, but not limited to, garbage, refuse, industrial, commercial and agricultural waste, sludges from air or water pollution control facilities or water supply treatment facilities, rubbish, ashes, contained gaseous material, incinerator residue, demolition and construction debris and offal, but not including sewage and other highly diluted water-carried materials or substances and those in gaseous form, special nuclear or by-prodcut [sic] material within the meaning of the Atomic Energy Act of 1954, as amended, or waste which appears on the list or satisfies the characteristics of hazardous waste promulgated by the Commissioner of the Department of Environmental Conservation.

(v) "Source Separation" means the segregation of recyclable materials from the solid waste stream at the point of generation for separate collection, sale or other disposition.

(w)"Vehicular Tires" shall mean tires from cars and trucks and their casings.

(x) The terms "solid waste," "recyclable material," "construction and demolition debris" and "major appliances" shall not be construed to include "green waste".

Section 2. Preparation of Solid Waste and Recyclables for Residential Collection.

In order to provide for public health and safety, and to facilitate the conservation of vital natural resources, each city, town and/or village within the County shall provide for the collection of solid waste and recyclable material. Each municipality shall provide to the County a plan for approval to provide for such collection. Such plan must demonstrate that regular, reliable collection of solid waste and recyclable ma-

terial will be provided to each property which generates that material to that municipality.

No person shall dispose of solid waste or recyclable or nonrecyclable material except as follows:

(a) In order to provide for public health and safety, and to facilitate the conservation of vital resources, each person shall provide for the removal of solid waste and recyclables from the property on which they are generated either through a service provided by a municipality or licensed private hauler, or by direct haul by the individual generator to a disposal location approved by the County.

(b) In order to facilitate the conservation of vital natural resources through recycling, each person shall provide for the separation of recyclables in a suitable container for recyclable material as authorized or provided by the County or by the Authority pursuant to contract with said County.

(c) In order to further facilitate the conservation of vital natural resources through recycling, discarded newspapers, glass, metals, corrugated cardboard, plastics, office paper and green waste shall be separated from other nonrecyclable material and placed in said container; the particular requirements for separation shall be established by the County or by the Authority pursuant to contract with the County.

(d) From the time of placement of solid waste and of recyclables at the roadside or other designated area approved by the County or by the Authority pursuant to contract with the County, or by a person for collection in accordance herewith, such solid waste and recyclables shall be delivered to the appropriate facility, entity or person responsible for disposition designated by the County or by the Authority pursuant to contract with the Authority. It shall be a violation of this ordinance for any person without a valid permit issued by the County to commercially collect, pick up, remove or cause to be collected, picked up or removed, any solid waste

and/or recyclables placed at the roadside or other designated area, and each such collection, picking up, or removal from one or more premises shall constitute a separate and distinct offense in violation of this ordinance. A resident may dispose of their recyclables by selling or donating the same to recyclers, but these recyclables may not be picked up at the roadside.

(e) It shall be a violation of this ordinance for any person to place at the roadside for collection any can or container other than one which has its contents separated into solid waste and/or recyclables.

(f) Tipping fees, if necessary for the collection, handling and disposal of recyclables shall be established by the Board as needed from time to time (i) upon its initiative, (ii) upon the recommendation of the County Executive, or (iii) pursuant to contract with the Authority.

Section 3. Marketing of Recyclables.

(a) In order to facilitate the marketing of recyclables, the County shall request letters of interest from recyclers expressing their willingness to accept recyclables. A list of interested parties will be established by the County.

(b) Prior to the marketing of recyclables, recyclers appearing on the list will be notified and given specifications with regard to available recyclables.

(c) In the event that recyclers submit a written proposal on said recyclables, it shall be required that said proposal be delivered to the County according to the specifications set forth by the County. Overall costs, the reliability that recyclables will be accepted by the proposer, the contract terms and conditions, including recyclables specifications, for the acceptance of recyclables shall all be major factors in evaluating and awarding a contract.

(d) All marketing of recyclables collected and separated shall, where practicable, be subject to competitive bid. It

shall be a term and condition of all bids for recyclables collected under this local law that the material purchased will be recycled and not landfilled or burned or otherwise not recycled.

(e) For purposes of this Section 3, all contracts awarded on or prior to the acceptance test of the Oneida-Herkimer Materials Recovery Facility shall be effective pursuant to its terms. The acceptance test referred to in this subsection 3(e) shall be the Plant Acceptance Test conducted pursuant to Section 15600.4 as contained in Specifications for the Oneida-Herkimer Materials Recovery Facility, Contract No. 5, Contractor Bid No. H-104-C-1, Process Mechanical. After the date of the acceptance test, this Section 3 shall no longer be of any force or effect.

Section 4. Preparation of Residential, Commercial and Industrial Construction, and Demolition Debris and Disposal of Same.

(a) Each city, town and/or village within the County shall provide a schedule for the collection of residential, commercial and industrial, and construction and demolition debris. Such debris which is recycled or reused for construction shall not be regulated by this ordinance.

(b) Said debris shall be delivered to the appropriate facility, entity or person responsible for disposition designated by the County or by the Authority pursuant to contract with the County.

(c) Tipping fees or other charges for the handling and disposal of residential, commercial and industrial, and construction and demolition debris shall be established and modified by the Board as needed from time to time (i) upon its initiative, (ii) upon the recommendation of the County Executive, or (iii) pursuant to contract with the Authority.

Section 5. Preparation of Residential Green Waste and Disposal of Same.

(a) Each city, town and/or village within the County shall provide a schedule for the collection of residential green waste.

(b) Said green waste shall be composted either by the County or pursuant to contract with the Authority at a site or sites designated by the County or, as applicable, the Authority, or at sites approved by it and operated by cities, towns or villages. Where allowed by law or regulation, this section shall not prohibit private composting of green waste.

(c) Tipping fees or other charges for the handling and disposal of residential green waste shall be established and modified by the Board as needed from time to time either upon [sic] (i) upon its initiative, (ii) upon the recommendation of the County Executive, or (iii) pursuant to contract with the Authority.

Section 6. Disposal of Commercial and Industrial Waste, and Recyclables.

(a) All commercial and industrial waste collected by either municipal or private haulers shall be delivered to the appropriate facility, entity or person responsible for disposition designated by the County.

(b) All commercial and industrial recyclables collected by either municipal or private haulers, and designated for processing and/or disposal at a County or Authority facility shall be packaged and collected in a manner designated by the County or the Authority pursuant to contract with the County, and delivered to a facility, entity or person responsible for its disposition designated by the County.

(c) Tipping fees or other charges for the handling and disposal of commercial and industrial waste, and recyclables shall be established and modified by the Board as needed from time to time upon [sic] (i) upon its initiative, (ii) upon the recommendation of the County Executive, or (iii) pursuant to contract with the Authority.

(d) Commercial or industrial recyclables collected by the metal industry, recyclers, and their agents, as well as the recyclable materials that they separate and market shall be exempt from this ordinance. Any waste they tender for municipal collection shall not include recyclables.

(e) Recyclable industrial and commercial by-products may be sold or donated by an industrial and/or commercial enterprise to any scrap metal enterprise or recycler. However, said by-products cannot be placed at the curbside for collection by said scrap metal enterprise or recycler.

Section 7. Disposal of Major Appliances and Tires.

(a) Each city, town and/or village within the County shall provide a schedule for the collection and disposal of major appliances and tires.

(b) Said major appliances and tires shall be disposed either by the County or pursuant to contract with the Authority at a site or sites designated by the County or at sites approved by the County operated by city, towns or villages.

(c) Tipping fees or other charges for the handling and disposal of major appliances and tires shall be established and modified by the Board as needed from time to time upon [sic] (i) upon its initiative, (ii) upon the recommendation of the County Executive, or (iii) pursuant to contract with the Authority.

Section 8. Preparation of Residential Hazardous Waste for Collection and Disposal of the Same.

(a) All household hazardous waste and farm hazardous waste shall be placed in a container determined by the County or the Authority pursuant to contract with the County.

(b) Household hazardous waste and farm hazardous waste shall be delivered to such facility, entity or person re-

sponsible for disposition as the County or the Authority, pursuant to contract with the County, shall determine.

(c) Tipping fees or other charges for the handling and disposal of household hazardous waste and farm hazardous waste shall be established and modified by the Board as needed from time to time upon [sic] (i) upon its initiative, (ii) upon recommendation of the County Executive, or (iii) pursuant to contract with the Authority.

Section 9. Disposal of Infectious Waste.

(a) Commencing January 1, 1990, all infectious waste as defined and regulated by Title 6 of the official compilation of Codes, Rules and Regulations of the State of New York (NYCRR) Part 360, shall be disposed of at a location designated by the County or by the Authority pursuant to a contract with the County, and by a method specified and approved by the County or the Authority, pursuant to contract with the County, and in compliance with all applicable State laws and regulations.

Section 10. Solid Waste Collection and Disposal Permit.

(a) Commencing January 1, 1990, all persons, companies, partnerships, municipalities or other entities engaged in the commercial collection, pick-up, transfer, and removal and/or disposal of solid waste and/or recyclables, in the County placed at the roadside or other designated location, and as defined in this law shall obtain a permit issued by the County or by the Authority pursuant to contract with the County. Failure to obtain such permit shall prohibit any such person, company, partnership, municipality or other entity from conducting such activities within the County. Failure to comply with this Subsection 10(a) shall subject the violator to the penalties set forth in Section 12.

(b) Failure to comply with the conditions and requirements of a permit issued pursuant to Section 10(a) hereof shall subject such person, company, partnership, municipali-

ties or entity to a revocation of such permit and revocation of all rights and privileges to collect, pick up, transfer, remove or dispose of solid waste or recyclables in the County as defined herein, and further, such failure to comply with this Subsection 10(b) shall subject the violator to the penalties set forth in Section 12.

Section 11. Prohibition Against Unauthorized Dumping.

By the adoption of this law, the Oneida County Board of Legislators also declares its intent to regulate the throwing, dumping, depositing and placing of solid waste and recyclable material on lands within Oneida County. This ordinance shall apply to throwing, dumping, depositing and placing of solid waste and recyclable material upon all lands, public or private, within Oneida County and thereon only in the manner herein provided:

(a) In order to provide for public health and safety and to facilitate the conservation of vital natural resources, each person shall provide the removal of garbage and recyclables from the property on which they are generated either through a service provided by a municipality or licensed private hauler, or by direct haul by the individual generator to a disposal location approved by the County or the Authority pursuant to contract with the County.

1) It shall be a violation of this law for any person to place, for the purpose of collection, solid waste and/or recyclables at a property other than the property generating said material.

2) It shall be a violation of this law for any person to place solid waste and/or recyclable material in dumpsters and/or containers designated for solid waste use by commercial and/or industrial establishments.

3) It shall be a violation of this law for any person to bury and/or burn solid waste material on public or private property.

4) It shall be a violation of this law for any person to throw, dump, deposit or place solid waste and/or recyclable material along the roadside or on public and/or private property within Oneida County.

5) It shall be a violation of this law for any person to cause to be thrown, dumped, deposited, or placed, solid waste and/or recyclable material along any public or private road or on lands bordering such roads.

Section 12. Enforcement: Penalties.

(a) Failure to comply with this ordinance by any person or tenant in cases where a lease agreement gives specific responsibility for solid waste disposal to said tenant, shall be an offense punishable as provided.

(b) Conviction of a first offense provided by this article shall be punishable by a fine of not less than $100 and not more than $500 and/or loss of solid waste collection and disposal permit, and, in addition, anyone convicted of a first offense thereunder shall be liable to pay a civil penalty of not less than $100 and not more than $500. Conviction of a second offense within a year of the first offense shall be punishable by a fine of not less than $500 nor more than $1,000 and/or loss of solid waste collection and disposal permit, or imprisonment of not more than fifteen (15) days, or both, and in addition, anyone convicted of a second offense thereunder shall be liable to pay a civil penalty of not less than $500 nor more than $1,000. Conviction of a subsequent offense within a year of the first offense shall be punishable by a fine of at least one thousand dollars ($1,000) and not more than two thousand dollars ($2,000) and/or loss of solid waste collection and disposal permit, or imprisonment of not more than thirty (30) days, or both, and, in addition, anyone convicted of a subsequent offense thereunder shall be liable to pay a civil penalty of one thousand dollars ($1,000). Conviction of any company, partnership, municipality or any entity other

than an individual person, shall be subject to a fine of not less than $2,500 nor more than $5,000.

(c) The prosecution and enforcement of violators for any non-compliance with this law shall lie as follows: (i) Municipalities (city, town or village) in the County which provide municipal collection or contract for collection with private haulers shall prosecute and enforce such violations. (ii) To the extent municipalities do not provide for municipal collection or contract for collection with private haulers, the County shall prosecute and enforce such violations.

Section 13. Effective Date.

Upon approval of the County Executive, this local law shall be effective immediately as per the implementation schedule attached and made a part hereof as if fully set forth herein.

Section 14. Severability.

If any part of this ordinance is found to be illegal by a court of competent jurisdiction, the remaining sections shall remain in full force and effect.

Section 15.

This Local Law shall take effect immediately and shall be the final version of all past and present legislation for the collection and disposition of solid waste, thereby repealing and rendering null and void Local Law #2 of 1989 and Local Law #1 of 1988.

APPROVED: Environmental Conservation Committee (October 25, 1989)

Laws & Rules Committee (October 31, 1989)

Ways & Means Committee (November 15, 1989)

ADOPTED BY THE FOLLOWING VOTE:
AYES 34 NAYS 0
DATED: December 13, 1989

APPENDIX G

LOCAL LAW
INTRODUCTORY NO. 1 – 1990

A LOCAL LAW FOR THE COLLECTION AND DISPOSITION OF SOLID WASTE INCLUDING GARBAGE, RECYCLABLES, CONSTRUCTION AND DEMOLITION DEBRIS, APPLIANCES, FURNISHINGS, YARD WASTE, HOUSEHOLD HAZARDOUS WASTE, AND FARM HAZARDOUS WASTE, TO SUPPLEMENT LOCAL LAW NO. 2 FOR THE YEAR 1988 AND AMEND CERTAIN SECTIONS THEREOF.

BE IT ENACTED by the Legislature of the County of Herkimer:

Section 1. Definitions.

(a) "Solid Waste" means all putrescible and non-putrescible solid wastes, including, but not limited to, materials or substances discarded or rejected as being spent, useless, worthless, or in excess to the owners at the time of such discard or rejection, or are being accumulated, stored, or physically, chemically or biologically treated prior to being discarded or rejected, having served their intended use, or as a manufacturing by-products [sic], including, but not limited to, garbage, refuse, industrial, commercial and agricultural waste sludges from air or water pollution control facilities or water supply treatment facilities, rubbish, ashes, contained gaseous material, incinerator residue, demolition and construction debris and offal, but not including sewage and other highly diluted water-carried materials or substances and those in gaseous form, special nuclear or by-product material within the meaning of the Atomic Energy Act of 1954, as amended, or waste which appears on the list or satisfies the characteristics of hazardous waste promulgated by the Commissioner of Environmental Conservation.

(b) "Garbage" means putrescible solid waste, including animal and vegetable waste resulting from the handling, storage, sale, preparation, cooking and/or serving of foods.

(1) "Household Garbage" originates primarily in home kitchens.

(2) "Commercial and Industrial Garbage" originates primarily in stores, markets, restaurants and other places where food is stored, prepared, and/or served, and the term shall also include all non-hazardous and non-toxic wastes which are not commercial and industrial by-products.

(c) "Hazardous Waste" includes pesticides and containers used for pesticides, used motor oil, automobile batteries, and all other materials, determined now or in the future to be hazardous by state or federal rule, regulation and/or statute.

(1) "Household Hazardous Waste" originates primarily in the home.

(2) "Farm Hazardous Waste" originates primarily on farms and/or results from farming activities.

(3) "Commercial and Industrial Hazardous Waste" originates primarily from commercial and industrial activities.

(d) "Yard Waste" means grass clippings, leaves, cuttings and other debris from shrubs, hedges and trees. "Garbage," "Recyclable Material," and "Construction and Demolition Debris" shall not be construed to include "Yard Waste".

(e) "Construction and Demolition Debris" means waste resulting from construction, remodeling, repair and demolition of structures, road building, and land clearing. Such wastes include, but are not limited to, bricks, concrete and other masonry materials, soil, rock, lumber, road spoils, paving material, and tree and brush stumps.

(f) "Major Appliances" means a large and/or bulky household mechanism (as a refrigerator, washer, dryer, stove, etc.) ordinarily operated by gas or electric current.

(g) "Large Household Furnishings" means all other large and/or bulky articles actually used in the home and which equip it for living (as chairs, sofas, tables, beds, carpets, etc.)

(h) "Recyclable Material" means any material designated, from time to time, by Herkimer County which, under any applicable law or regulation, is not hazardous and which is separated from the waste-stream and held for its material recycling or reuse value.

(i) "Recyclable Commercial and Industrial By-products" includes all materials which are a by-product of production utilized in production or sale by a commercial enterprise or industrial enterprise.

(j) "Recyclers" means those persons who deal with recyclable material as collectors, separators and/or marketers. This definition includes not-for-profit corporations and charitable corporations which collect recyclables for fund raising purposes.

(k) "Source Separation" means the segregation of recyclable materials from the solid waste stream at the point of generation for separate collection, sale or other disposition.

(l) "Vehicular Tires" means tires from cars, trucks, domestic, recreational and farm vehicles.

(m) "Person" means any owner or owners of residential property, individual head of household, landlord, Chief Executive Officer, school superintendent, owner or manager of a commercial or industrial establishment.

(n) "Legislature" means the Herkimer County Legislature or for the purpose of this Local Law only, a Committee of the Legislature, or an employee or officer of the County of Herkimer designated by the Legislature to perform duties under

this Local Law and/or the regulations adopted pursuant thereto.

(o) "Household Metals" shall mean any empty metal food containers including aluminum, by-metal and steel cans.

(p) "Infectious Waste" shall be as defined in 6 NYCRR Part 360 as amended.

(q) Authority shall mean the Oneida-Herkimer Solid Waste Management Authority.

Section 2. Preparation of Solid Waste and Recyclable Material for Residential Collection.

In order to provide for public health and safety and to facilitate the conservation of vital natural resources, each city, town and/or village within the county shall provide for the collection of solid waste and recyclable material. Each municipality shall provide by June 30, 1990 to the Legislature a plan for approval to provide for such collection, which plan shall include the schedules required by Sections 4(a), 5(a) and 7(a) of this Local Law. Such plan must demonstrate that regular, reliable collection of solid waste and recyclable material will be provided to each property which generates that material in that municipality. Amendments to any such plan may be filed with the County but shall not be effective until accepted and approved by the Legislature.

The Legislature shall determine the schedule of implementation for collection of recyclable material in the County. If the Legislature has designated an employee, officer or committee, as provided in this Local Law, the determination shall be subject to approval by the Legislature.

After the schedule of implementation has been imposed in an area of the County and becomes effective by its terms, no person shall dispose of garbage or recyclable or nonrecyclable material except as follows:

(a) In order to facilitate the conservation of vital natural resources through recycling: Each person shall provide for the separation of recyclable material in a suitable container or containers as authorized by the Legislature or as approved by the County of Herkimer or the Authority contracting with said County.

(b) In order to further facilitate the conservation of vital natural resources through recycling: Discarded newspapers, emptied glass containers, household metals, corrugated cardboard, plastics, high grade office paper and yard waste shall be separated from other nonrecyclable material and placed in authorized containers. The particular requirements for separation shall be established by the Legislature, or by the Authority pursuant to contract with the County.

(c) After placement of garbage and of recyclable materials at the roadside or other designated area approved by the Legislature by a person for collection in accordance herewith, such garbage and recyclable material shall be delivered to the appropriate facility designated by the Legislature, or by the Authority pursuant to contract with the County. It shall be a violation of this Local Law for any person without authority from the Legislature to collect, pick up, remove or cause to be collected, picked up or removed any garbage or recyclable material placed at the roadside or other designated area and each such collection, picking up, or removal from one or more premises shall constitute a separate and distinct offense in violation of the Local Law. A person may dispose of their recyclables by selling or donating the same to recyclers, but these recyclables may not be picked up at the roadside.

(d) It shall be a violation of this Local Law for any person to place at the roadside or other designated area for collection any can or container other than one which contains only garbage on [sic] recyclable material, except under regulations established by the Legislature.

(e) Tipping fees if necessary for the collection, handling and disposal of recyclables shall be established by the Legislature, or by the Authority pursuant to contract with the County.

Section 3. Public Sale of Recyclables.

(a) In order to facilitate the sale and/or marketing of recyclable material, the Legislature or the Authority pursuant to contract with the County shall request letters of interest from recyclers expressing their willingness to purchase recyclable material from the County. A list of interested parties shall be established.

(b) Prior to the sale of recyclable material, recyclers appearing on the list will be notified and given specifications with regard to available recyclable material for sale.

(c) In the event that recyclers bid on said recyclable material, it shall be required that said bid be written and delivered to the Legislature or the Authority in accordance with the specifications set forth.

In the case of awarding a bid, the highest bid price from a responsible bidder will be accepted. The Legislature and the Authority, however shall retain the right to reject all bids and authorize a rebidding.

(d) All sales and/or marketing of recyclables collected and separated shall be subject to bid. It shall be a term and condition of all bids for recyclables collected under this local law that the material purchased will be recycled and not landfilled or burned or otherwise not recycled.

Section 4. Preparation of Residential, Commercial and Industrial Construction and Demolition Debris and Disposal of the Same.

(a) Each city, town and/or village within the county shall provide a schedule for the collection of residential, commercial and industrial construction and demolition debris. Such

material which is recycled or reused for construction shall not be regulated by this Local Law.

(b) Said debris shall be disposed of at the Demolition Debris Disposal Site or other suitable site as designated by the Legislature under the terms and conditions established by the Legislature.

(c) Tipping fees or other charges for the handling and disposal of residential, commercial and industrial and construction debris shall be established and modified by the Legislature as needed from time to time, or by the Authority pursuant to contract with the County.

Section 5. Preparation of Yard Waste and Disposal of the Same.

(a) Each city, town and/or village within the county shall provide a schedule for the collection of yard waste.

(b) Said yard waste shall be composted either by the County of Herkimer at a site or sites designated by the Legislature, or by the Authority pursuant to contract with the County or at sites approved by the Legislature operated by cities, towns or villages. Where allowed by law or regulation, this section shall not prohibit private composting of yard waste.

(c) Tipping fees or other charges for the handling and disposal of residential yard waste shall be established and modified by the Legislature as needed from time to time.

Section 6. Disposal of Commercial and Industrial Garbage and Recyclables.

(a) All commercial and industrial waste collected by either municipal haulers or private haulers shall be delivered to the appropriate facility designated by the Legislature, or by the Authority pursuant to contract with the County.

(b) All commercial and industrial recyclables designated for disposal at a County facility shall be packaged and col-

lected in a manner designated by the Legislature, and delivered to a facility designated by the Legislature, or by the Authority pursuant to contract with the County.

(c) Tipping fees and other charges for the handling and disposal of commercial and industrial garbage and recyclables shall be established and modified by the Legislature, or by the Authority pursuant to contract with the County as needed from time to time.

(d) The materials collected by the metal industry and Recyclable Commercial and Industrial by-Products collected by recyclers shall be exempt from this Local Law. Any waste tendered for municipal collection by commercial and industrial enterprises shall not include such recyclables.

(e) Recyclable industrial and commercial by-products may be sold or donated by an industrial and/or commercial enterprise to any scrap metal enterprise or recycler. However, said materials cannot be placed at the curbside for collection by said scrap metal enterprise or recycler.

Section 7. Disposal of Major Appliances, Large Household Furnishings and Vehicular Tires

(a) Each city, town and/or village within the county shall provide a schedule for the collection of and disposal of major appliances, large household furnishings and vehicular tires.

(b) Said major appliances, large household furnishings and vehicular tires shall be disposed of by delivery to a site or sites designated by the Legislature or at sites approved by the Legislature, or by the Authority pursuant to contract with the County operated by city, towns or villages.

(c) Tipping fees or other charges for the handling and disposal of major appliances and tires shall be established and modified by the Legislature, or by the Authority pursuant to contract with the County as needed from time to time.

Section 8. Preparation of Household Hazardous Waste for Collection and Disposal of the Same.

(a) All household hazardous waste and farm hazardous waste shall be placed in a container determined by the Legislature, or the Authority pursuant to contract with the County.

(b) Household hazardous waste and farm hazardous waste shall be delivered to such facility as the Legislature, or the Authority pursuant to contract with the County shall designate.

(c) Tipping fees or other charges for the handling and disposal of residential hazardous waste shall be established and modified by the Legislature, or by the Authority pursuant to contract with the County[,] as needed from time to time.

Section 9. Disposal of Infectious Waste

(a) Commencing January 1, 1990 to March 1, 1990, all infectious waste as defined and regulated by Title 6 of the official compilation of Codes, Rules and Regulations of the State of New York (NYCRR) Part 360, shall be disposed of at a location designated by the County or by the Authority pursuant to a contract with the County and by a method specified and approved by the County or the Authority, pursuant to contract with the County, and in compliance with all applicable State laws and regulations.

Section 10. Solid Waste Collection and Disposal Permit.

(a) Commencing January 1, 1990, all persons, companies or other [sic] engaged in the commercial collection, pick-up, transfer, removal and/or disposal of solid waste and/or recyclables, placed at the roadside or other designated location and as defined in this law shall obtain a permit issued by the County or by the Authority pursuant to contract with the County. Failure to obtain such permit shall prohibit a person, company or other entity from conducting such activities

within the County. Failure to comply with this Subsection 10(a) shall subject the violator to the penalties set forth in Section 13.

(b) Failure to comply with the conditions and requirements of a permit issued pursuant to Section 10(a) hereof shall subject such person, company or entity to a revocation of such permit and revocation of all rights and privileges to collect, pick up, transfer, remove or dispose of solid waste or recyclables as defined herein, and further such failure to comply with this Subsection 10(b) shall subject the violator to the penalties set forth in Section 13.

Section 11. Prohibition Against Unauthorized Dumping.

By adoption of this law, the Herkimer County Legislature also declares its intent to regulate the throwing, dumping, depositing and placing of solid waste and recyclable material on lands within Herkimer County. This ordinance shall apply to throwing, dumping, depositing and placing of solid waste and recyclable material upon all lands, public or private, within Herkimer County and thereon only in the manner herein provided:

(a) In order to provide for public health and safety and to facilitate the conservation of vital natural resources: each person shall provide for the removal of garbage and recyclables from the property on which they are generated either through a service provided by a municipality or licensed private hauler or by direct haul by the individual generator to a disposal location approved by the County or the Authority pursuant to contract with the County.

(1) It shall be a violation of this law for any person to place for the purpose of collection solid waste and/or recyclables at a property other than the property generating said material.

(2) It shall be a violation of this law for any person to place solid waste and/or recyclable material in dumpsters and/or containers designated for solid waste use by commercial and/or industrial establishments.

(3) It shall be a violation of this law for any person to bury and/or burn solid waste material on public or private property.

(4) It shall be a violation of this law for any person to throw, dump, deposit or place solid waste and/or recyclable material along the roadside or on public and/or private property within Herkimer County.

(5) It shall be a violation of this law for any person to cause to be thrown, dumped, deposited, or placed solid waste and/or recyclable material along any public or private road or on lands bordering such roads.

Section 12. Rules and Regulations.

(a) Rules and regulations imposed for the purpose of implementing the provisions of this Local Law shall be adopted or approved by the Herkimer County Legislature.

(b) Before adopting or approving such rules and regulations the Committee on Solid Waste of the Herkimer County Legislature, or such other committee as shall be designated, shall hold a public hearing upon at least five (5) days notice to consider the proposed rules and regulations. Such notice shall be published one time in the official newspapers of the County and mailed by regular mail to the supervisors of all the towns and the mayors of the city and villages in the County.

(c) Said rules and regulations shall not become effective until ten (10) days after adoption or approval by the Herkimer County Legislature. During such ten (10) day period the Legislature shall, by such means it deems proper, publicize the said rules and regulations.

Section 13. Enforcement: Penalties

(a) Any person who violates any provision of this Local Law, or any rule or regulation issued pursuant thereto, which has been approved by the Legislature, shall be guilty of an offense punishable, by a fine of One Hundred to Five Hundred Dollars ($100.00-500.00), and in addition thereto, shall be liable to pay a civil penalty of Two Hundred Fifty to Five Hundred Dollars ($250.00-500.00); for a second violation within one year of the first violation shall be guilty of an offense punishable by a fine of Five Hundred to One Thousand Dollars ($500.00-1,000.00), or by imprisonment for up to Fifteen (15) days, or both, and in addition thereto, shall be liable to pay a civil penalty of Five Hundred to One Thousand Dollars ($500.00-$1,000); for a third and each subsequent violation shall be guilty of a misdemeanor punishable by a fine of not less than One Thousand Dollars ($1,000.00), or more than Two Thousand Dollars ($2,000.00), or by imprisonment for up to Thirty (30) days, or both, and in addition thereto, shall be liable to pay a civil penalty of One Thousand Dollars ($1,000.00) to Two Thousand Dollars ($2,000.00). Each violation shall be a separate and distinct offense and, in the case of a continuing violation, each day's continuance thereof shall be deemed a separate and distinct violation. Corporations, companies, partnerships and municipalities shall be subject to the monetary fines and civil penalties set forth above.

(b) The prosecution and enforcement of violations for any non-compliance with this law shall lie as follows: Municipalities (city, town or village) in the County which provide municipal collection of solid waste or any type thereof or contract for such collection with private haulers shall prosecute such violations. If municipalities neglect or refuse to prosecute such violations or if municipalities do not provide for collection or contract for collection with private haulers, the County shall prosecute such violators.

(c) In the event that a person shall be found guilty of violating this Local Law he shall be liable for civil penalties as set forth in subparagraph (a) above and also for further civil penalties in the amount of reasonable attorneys fees, costs of expert witnesses, costs of testing if and when necessary for prosecution and other reasonable and necessary costs associated with the prosecution of the action.

(d) The County Attorney is authorized to commence an action in any court of competent jurisdiction to adjoin any violation of this Local Law when directed by the Herkimer County Legislature.

Section 14. Implementation.

(a) The County of Herkimer shall cause to be drawn up an implementation schedule or schedules which shall list all portions of this Local Law previously implemented and all portions thereof which remain to be implemented. Such schedule or schedules shall be mailed by certified mail return receipt requested to each municipality, addressed to the clerk of the governing board of the municipality. Said schedule or schedules shall be effective upon the date of such mailing.

Section 15. Severability.

If any part or section of this ordinance is found to be illegal by a court of competent jurisdiction, the remaining parts or sections shall remain in full force and effect.

Section 16. Effective Date:

(a) This Local Law shall take effect immediately.

(4)

No. 05-1345

FILED

JUN 23 2006

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., *et al.*,

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

MICHAEL J. CAHILL
Counsel of Record
GERMANO & CAHILL, PC
4250 Veterans Memorial Highway
Suite 275
Holbrook, New York 11741
(631) 588-8778

Attorneys for Oneida–Herkimer Solid Waste Management Authority

(Additional Counsel Listed on Signature Page)

201826

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

ALTERNATE QUESTION PRESENTED

Whether the solid waste flow control laws of two local governments, which have been found to place no burden on interstate commerce, violate the dormant Commerce Clause of the Constitution?

TABLE OF CONTENTS

	Page
ALTERNATE QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
SUMMARY OF THE ARGUMENT	1
REASONS FOR DENYING THE PETITION	2
I. *United Haulers I* Does Not Conflict With *Carbone* Or Other Dormant Commerce Clause Jurisprudence of this Court	5
II. *United Haulers II* Contains No New Construction Of *Pike*, But Confirms The Overwhelming Benefits Of The Laws In Comparison To Any Presumptive Burdens On Interstate Commerce	9
III. There Is No True Conflict With The Law Of Another Circuit	13
CONCLUSION	16

TABLE OF CITED AUTHORITIES

Page

Cases:

C&A Carbone v. Town of Clarkstown,
511 U.S. 383 (1994) ..... *passim*

California Reduction Company, et al.
v. Sanitary Reduction Works of San Francisco,
199 U.S. 306 (1905) 7-8

City of Philadelphia v. New Jersey,
437 U.S. 617 (1978) 8

Fort Gratiot Sanitary Landfill
v. Michigan Dept. of Natural Resources,
504 U.S. 353 (1992) 8

Freedom Holdings Inc v. Spitzer,
357 F.3d 205 (2d Cir. 2004) 11

General Motors v. Tracy, 519 U.S. 278 (1997) 7

Harvey & Harvey v. County of Chester, Pa.,
68 F.3d 788 (3d Cir. 1995) 7

Houlton Citizen's Coalition v. Town of Houlton,
175 F.3d 178 (1st Cir. 1999) 7

Huish Detergents v. Warren County Ky.,
214 F.3d 707 (6th Cir.2000) 13

Maine v. Taylor, 437 U.S. 131 (1986) 13

Cited Authorities

Page

NSWMA v. Daviess County,
434 F.3d 898 (6th Cir. 2006) 2, 3, 14, 15

National Electric Manufacturers Assoc. v. Sorrell,
272 F.3d 104 (2d Cir. 2001) 11

Oregon Waste Systems v. Dep't of Environmental Quality,
511 U.S. 93 (1994) 5

Pike v. Bruce Church, 397 U.S. 137 (1970) ..... *passim*

United Haulers I, 261 F.3d 245 (2d Cir. 2001) ... *passim*

United Haulers II, 438 F.3d 150 (2d Cir. 2006) ... *passim*

Waste Management v. Metro. Gov't of Nashville,
130 F.3d 731 (6th Cir.1997) 13

Constitution and Statutes:

Resource Conservation & Recovery Act (RCRA)
42 U.S.C. § 6901, *et seq.* 6

SUMMARY OF THE ARGUMENT

The Court should deny the Petition because the decisions below are consistent with *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994) and the Court's other dormant Commerce Clause jurisprudence. In *United Haulers I*, 261 F.3d 245 (2d Cir. 2001), the Court of Appeals properly found that strict scrutiny should not apply because the burdens of the Oneida-Herkimer regulatory scheme were designed to fall equally on all private sector actors, were not applied to waste generated in other states, and did not target any out-of-state business for different treatment from any local business. It remanded the matter for development of a record which ultimately explored all of the alleged burdens on interstate commerce and all of the putative benefits provided by the challenged legislation.

In *United Haulers II*, 438 F.3d 150 (2d Cir. 2006), the court examined the developed record under the balancing test of *Pike v. Bruce Church*, 397 U.S. 137 (1970), and found no burden on interstate commerce that could be distinguished from identical burdens on intra-state commerce, and further found that the substantial benefits of the Oneida-Herkimer waste management system could not be fully achieved through any means other than flow control.

The petitioner's reading of *Carbone* as a blanket *per se* prohibition of flow control laws of all kinds is not supported by *Carbone*, and was properly rejected by the Second Circuit and by other courts of appeals. The court of appeals' focus on the public nature of the Oneida-Herkimer facilities is entirely consistent with this Court's traditional respect for the responsibilities of state and local government in waste management. The Second Circuit's application of the *Pike* standard was correct, because the benefits provided by the

counties' flow control laws were far more than "minimal," while petitioners could not articulate any burden on interstate commerce that differed in quality or quantity from identical burdens placed on intrastate commerce.

The conflict alleged in the petition is shallow, and not yet appropriate for consideration by this Court. The Sixth Circuit's criticism of *United Haulers I* in *NSWMA v. Daviess County*, 434 F.3d 898 (6th Cir. 2006), is dicta. That court ruled against the public agency because it felt bound by precedent established in cases which did not address the distinction between public and private solid waste facilities. No other circuit has directly addressed the issue. The resolution of other cases where the public/private issue is presented squarely, and the reviewing court is not implicitly bound by local precedent, may provide a vehicle for review by this Court.

However, respondents agree that the issues addressed in the decision below are important ones, as they go to the heart of state and local power to provide basic sanitation service to the public. To the extent that this Court finds it necessary to address the distinction between public and private beneficiaries under the dormant Commerce Clause, this case would be an appropriate vehicle to do so.

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with this Court's dormant Commerce Clause cases, nor with other courts of appeals' decisions. Nor does *United Haulers II* fail to properly apply *Pike v. Bruce Church*.

In 2001, the court of appeals reversed and remanded the first decision of the district court granting summary judgment

to the petitioners (Petition Appendix 103a-117a)[1] with its decision in *United Haulers I*, App. 22a-53a. The court recognized that waste disposal is a traditional local government function and found that because the local laws of Oneida and Herkimer counties directed local waste to public, not private facilities, the laws did not discriminate against interstate commerce. *Id.* at 51a. Therefore, the court held that the laws should be reviewed under the balancing test articulated in *Pike v. Bruce Church*. In addition, the court of appeals found that the district court had improperly granted summary judgment in the absence of discovery by the parties, and "without reference to the unique facts of this case." *Id.* at 39a. Respondents had argued that discovery was necessary, and would reveal facts establishing that the flow control laws were indispensable to the success of respondent's waste management system, even under strict scrutiny. Accordingly, the court of appeals remanded the matter for development of the record and "further argument by the parties, which will undoubtedly assist the court in this fact intensive determination." *Id.* at 52a.

As a result, when the court of appeals heard the matter for the second time in 2006, an extensive record had been developed, addressing both the alleged burdens on interstate commerce and the public benefits of the laws in substantial detail. Testimony and expert reports from both sides explored the organization and economics of the waste industry, the organization, economics and objectives of the respondent's public waste system, the role of the challenged laws in the

---

1. The decisions of the U.S. District Court for the Northern District of New York and the Second Circuit Court of Appeals are reproduced in the Appendix to the Petition for Certiorari, and will be cited here with reference to the Appendix, as App. 1a, *et seq.*

public system, and their effects on a variety of private interests both within and outside of the counties and the State of New York. Significantly, both sides presented fact and argument directed at the potential alternatives to flow control available to Oneida and Herkimer counties as a means of achieving the counties' waste management goals.

Petitioners were unable to identify any burden that the local laws placed on interstate commerce. Petitioners presented no evidence that the laws had an extraterritorial effect, no sign of interference with the regulatory regimes of other states, and no evidence that in-state and out-of-state interests compete in Oneida and Herkimer counties on anything other than an equal footing. App. 18a. Each lower court found substantial and obvious benefits provided by the local laws, with the court of appeals noting in particular that

> nothing in the record before us demonstrates, or even suggests, that the counties could address their liability concerns, or encourage recycling across the wide range of waste products accepted by the Authority's recycling program in any other way, let alone through the use of an approach as straightforward as the use of flow control.

Id. at 20a.

At the end of the day, when the court of appeals considered all the evidence of burdens on interstate commerce that could be mustered by the petitioners against all of the evidence of environmental, social and economic benefit offered by respondents, and examined the alternative means available to the counties to achieve their legitimate waste management goals, the court rightly concluded that

the laws do not violate the dormant Commerce Clause. That conclusion is sustainable under *either* the *Pike* or strict scrutiny tests.

I. *United Haulers I* Does Not Conflict With *Carbone* Or Other Dormant Commerce Clause Jurisprudence of this Court.

The Second Circuit Court of Appeals was correct in finding that the laws of Oneida and Herkimer counties did not discriminate against interstate commerce, remanding the matter to the district court for review of incidental impacts under *Pike*. Discrimination, for purposes of the dormant Commerce Clause, "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems v. Dep't of Environmental Quality*, 511 U.S. 93, 99 (1994). The laws at issue here treat both in-state and out-of-state economic interests exactly alike, and the facts of this case are distinguishable from the circumstances presented in *Carbone* in several ways.

First, there is no evidence that these laws impact the movement of solid waste originating in other states in any way. The laws at issue in *Carbone* operated to capture waste originating in New Jersey and require its delivery to the Clarkstown, New York transfer station designated by the law. As a result, this Court found that the Clarkstown laws had the effect of raising the price of waste disposal for residents of New Jersey. 511 U.S. at 389.

Second, there is no evidence that any waste hauler, processor, transporter or disposal facility is treated differently in Oneida and Herkimer counties because it is based locally

or out-of-state. In contrast, Clarkstown's designated transfer station operator was a private monopolist, guaranteed 120,000 tons of waste per year at a rate of $81 per ton for five years. 511 U.S. at 387. The value of this contract was over $48 million, but it was not to be paid by the Town unless the ordinance failed in its purpose. The funds were to come through private transactions between the operator and Clarkstown's residents, enforced by the law. Here, fees are paid to local government for the direct provision of public services by local government.

Third, the Oneida-Herkimer laws mandate participation in a public system, in which local government has assumed responsibility for waste management. In contrast, Clarkstown's scheme operated to relieve the Town of responsibility for its waste problem, by designating someone else to manage it. Here, the public agencies have stepped into, not out of, their waste management responsibilities, and crafted a multi-facility system designed to reduce waste generation, increase recycling, and remove hazardous substances from the waste stream. Unlike Clarkstown's action, the Oneida-Herkimer system is the product of a solid waste management plan adopted after extensive public participation, approved by the State of New York and designed to comport with the national solid waste management goals articulated by Congress in the Resource Conservation and Recovery Act of 1976 (42 U.S.C. § 6901 *et seq.*). App. 24a-29a.

Fourth, the decisions below properly recognized that solid waste management is a traditional interest of local government. The concern of public waste management is safe and reliable sanitation, protection of public health and preservation of natural resources. Public agencies do not set out to manage their citizens' waste as a form of entrepreneurial activity. They do so to

fulfill the responsibilities given to them by the electorate. These motives and responsibilities cannot be fairly compared to the ambitions of private economic interests, which arise from quite different purposes and responsibilities. This Court has founded its dormant Commerce Clause jurisprudence on the principle of fair comparison. "Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities." *General Motors v. Tracy*, 519 U.S. 278, 298 (1997). In *United Haulers I*, the court rightly rejected the false comparison of public and private interests urged by the petitioners. App. 47a-51a.

The court of appeals was in accord with the jurisprudence of this Court in refusing to read the *Carbone* decision as a *per se* prohibition of all flow control laws, and the elimination of a constitutional distinction between public and private facilities.[2] This Court has always been careful to preserve the distinction between public and private entities in its waste cases. The power to provide exclusive municipal waste disposal service was recognized by the Supreme Court over 100 years ago in *California Reduction Company, et al. v. Sanitary Reduction*

---

2. *See also Harvey & Harvey v. County of Chester, Pa.*, 68 F.3d 788, 802 (3d Cir. 1995), "While *Carbone* clearly has broad application, it did not establish a *per se* rule subjecting all flow control ordinances to strict scrutiny"; and *Houlton Citizen's Coalition v. Town of Houlton*, 175 F.3d 178, 188 (1st Cir. 1999),

> We do not interpret *Clarkstown* as explicating a broadbased ban on every flowcontrol ordinance that happens to be coupled with an exclusive contractual arrangement in favor of an instate operator. To suggest that every such ordinance violates *Clarkstown* would stretch both Justice Kennedy's language and the logic of the dormant Commerce Clause past the breaking point.

Works of San Francisco, 199 U.S. 306 (1905), when the Court rejected a challenge by local waste "scavengers" to San Francisco's award of a disposal franchise to a single company.

More recently, in striking down New Jersey legislation barring the import of Philadelphia waste into the state in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), the Court was careful not to disturb the state's power to restrict the use of public facilities. "We express no opinion about New Jersey's power, consistent with the Commerce Clause, to restrict to state residents access to state-owned resources." *Id.* at 627 n.6. Similarly, in striking down Michigan regulations that barred certain out-of-state waste from Michigan landfills, the Court was careful to limit its ruling to private facilities. "Nor does the case raise any question concerning policies that municipalities or other governmental agencies may pursue in the management of publicly owned facilities. The case involves only the validity of the Waste Import Restrictions as they apply to privately owned and operated landfills." *Fort Gratiot Sanitary Landfill v. Michigan Dept. of Natural Resources*, 504 U.S. 353, 358-359 (1992).

The Second Circuit concurred with this Court's observation in *Carbone* that "state and local governments are expending significant resources to develop trash control systems that are efficient, lawful and protective of the environment. The difficulty of their task is evident from the number of recent cases that we have heard involving waste transfer and treatment." 511 U.S. at 386. The court observed in *United Haulers I*

> Although the Supreme Court's and this Court's recent spotlight on local solid waste regulation

> provides us with a framework within which to analyze this challenge, many questions remain unanswered with respect to the constitutionality of municipal flow control laws. . . . Unfortunately, these missing pieces to the constitutional puzzle often force states and municipalities to engage in guesswork about the constitutionality of proposed solid waste management schemes, which are expensive and time-consuming to implement.

App. 32a.

The decisions of this Court and the Second Circuit are in accord as to the unique responsibilities of local government in managing waste. Where local regulations favor no entity save the public waste management system, and otherwise treat all private sector interests alike, there is no "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter" and no discrimination against interstate commerce. The Second Circuit correctly ruled that such regulations should be reviewed under the balancing test of *Pike v. Bruce Church.*

II. *United Haulers II* Contains No New Construction Of *Pike*, But Confirms The Overwhelming Benefits Of The Laws In Comparison To Any Presumptive Burdens On Interstate Commerce.

Petitioners misstate the Second Circuit's ruling when they allege that the decision in *United Haulers II* misconstrues the *Pike* standard. (Pet. 28-30). Contrary to petitioners' claim, the court did not narrow the range of cognizable burdens under *Pike*, but accepted the petitioners' proposed formulation for purposes of the *Pike* balance.

The court found, however, that as a matter of fact, petitioners' alleged burden was insubstantial and far outweighed by the benefits of the local laws. App. 16a-21a. Because the court's ruling was a factual, not a legal determination, it is not appropriate for review by this Court.

On remand to the district court, the parties conducted discovery and explored the nature and operation of the Authority's solid waste management system in great detail. Expert reports were prepared by both sides, and testimony was taken from public officials and the private plaintiffs. Each side analyzed the effects of the local laws on various aspects of waste handling operations, from local collection, through processing of recyclable and non-recyclable wastes, transportation within and beyond the borders of New York State, and disposal at facilities within a market radius of Oneida and Herkimer counties. In the evidence submitted to the court, special attention was paid to the role of the fees charged by the Authority in the administration of its waste management plan, in requiring the participation of local haulers in the delivery of specific wastes to specific facilities, and to the alternatives available to the counties and the Authority in financing and implementing the system.

The petitioners conceded that they could not identify any out-of-state interest, whether a hauler, processor, transporter or disposal facility, that was treated differently by the local laws than a similar interest located within the counties. App 68a, 97a. Instead, petitioners simply alleged that the injury to interstate commerce was a potential diminution of the general commerce in solid waste, an injury that was indistinguishable from the injury to intrastate commerce.

Both the magistrate and the district court examined the evidence to determine whether the laws placed a "burden on interstate commerce that is qualitatively or quantitatively different from that imposed upon intrastate commerce" (App 66a, 90a), each applying the Second Circuit's recent articulation of the showing needed to establish an incidental burden under the *Pike* standard. *Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205, 217-28 (2d Cir. 2004), *National Electric Manufacturers Assoc. v. Sorrell*, 272 F.3d 104, 109 (2d Cir. 2001). Both the magistrate and the district court found no "disparate impact" on interstate commerce, and therefore, no incidental burden on interstate commerce. Consequently, neither the magistrate nor the district court performed any balancing of non-existent burdens against the putative benefits of the laws. App 70a, 101a. Rather, they each found that petitioners' Commerce Clause claim failed because no burden had been established.

On appeal, petitioners argued that the Second Circuit's jurisprudence had not foreclosed the possibility that a general diminution of commerce in waste might, in and of itself, be a cognizable burden on interstate commerce. The court of appeals responded that "If we are persuaded that it does, we must augment the list of regulatory effects that we have viewed as imposing a differential burden on interstate commerce." App. 13a-14a. The court, however, declined to address that question, finding it "readily apparent that even if we were to endorse plaintiffs' claim that the counties' ordinances burden interstate commerce by preventing the counties' wastes from being processed by non-local facilities, the resulting burden would be substantially outweighed by the ordinances' local benefits." *Id.* at 16a. The court then proceeded to address the benefits of the counties' laws within the context of their solid waste management system, and balance those benefits against the presumed burden advanced by the petitioners.

The district court adopted the Report and Recommendation of the magistrate as the factual basis for its analysis. App. 57a. In that Report, the magistrate noted that the counties' flow control laws were "enacted as part of an overall waste management program that included creation of the [Authority]" (App. 76a) and characterized them as "forming the underpinning of comprehensive solid waste reform" (*Id.* at 97a), and as "one component of a wholly integrated waste management scheme." *Id.* at 101a. The court of appeals found that "the ordinances' benefits . . . are clear and substantial." App. 17a.

Specifically, the court of appeals found that financial security for the counties' comprehensive system was a legitimate benefit of the laws, and sufficient under this Court's precedent to justify a non-discriminatory regulation. App. 18a-19a. The court also found that the use of "tipping fees" to fund the system allowed distribution of the costs of the system to the individuals and businesses who placed the most demand upon it, in an administratively convenient way. *Id.* at 19a-20a. More importantly, the court found that the flow control laws "substantially facilitate the counties' goal of establishing a comprehensive waste management system that encourages waste volume reduction, recycling and reuse, and ensures the proper disposal of hazardous wastes, thereby reducing the counties' exposure to costly environmental tort suits." The laws also allowed the Authority to direct specific kinds of waste to specific facilities, to use differential pricing for different categories of waste, to inspect waste and fine violators, and to ensure environmentally sound disposal. *Id.* at 20a.

Indeed, considering the number and variety of legitimate interests served by the local laws, the court found no suggestion in the record that the counties could achieve all

of them "in any other way, let alone through an approach as straightforward as the use of flow control." *Id.* at 20a.[3]

The factual record here overwhelmingly supports the conclusion of the court of appeals that the incidental burdens of these laws on interstate commerce, however quantified, do not outweigh their benefits. This case does not present the hypothetical balancing of a "minimal" local benefit against an "insubstantial" burden, as postulated by petitioners. Thus, the application of the *Pike* balance in *United Haulers II* does not merit this Court's attention.

III. There Is No True Conflict With The Law Of Another Circuit.

Petitioners cite the recent decision of the Sixth Circuit Court of Appeals in *National Solid Wastes Management Ass'n v. Daviess County, Ky.*, 434 F.3d 898 (6th Cir. 2006) as being in conflict with the Second Circuit's decision in *United Haulers I*.[4] The decision entered in *Daviess County*, however, was governed by Sixth Circuit precedent established in two prior decisions, *Waste Mgmt. v. Metro. Gov't of Nashville*, 130 F.3d 731 (6th Cir. 1997) and *Huish Detergents v. Warren County*, 214 F.3d 707 (6th Cir. 2000). As the *Daviess* court observed

> Those cases did not directly address the public-private ownership issue raised by *United Haulers*;

---

3. This finding, although made in the context of the *Pike* balance, vindicates the respondents' position that these laws are essential to the achievement of the counties' waste management goals and would meet the strict scrutiny test of *Maine v. Taylor*, 437 U.S. 131 (1986).

4. As of the submission of this response, the time for Daviess County, Kentucky to file a petition for certiorari with this Court had not yet expired.

> however, an adoption by this Court of the public-private ownership distinction, as suggested by Defendant and *amici*, would amount to the overturning of our prior decisions, as a necessary implication of those decisions was that public ownership did not change the dormant Commerce Clause inquiry. This Court does not have the ability to take such action.

434 F.3d at 910.

The court in *Daviess* then went on to express, in dicta, its respectful disagreement with the Second Circuit's reading of *Carbone*. The *Daviess* panel pointed out various textual references in *Carbone* that it felt could counter the Second Circuit's view that the justices in *Carbone* ultimately disagreed on whether the Clarkstown facility was publicly or privately owned. 434 F.3d 910-912.

However, the ruling of the Second Circuit in *United Haulers I* was not based solely upon its textual analysis of the *Carbone* decision. "Nevertheless, we require more than the Court's silence on this point before concluding that it either accepted or rejected the public/private distinction advocated by the concurring and dissenting opinions." App. 45a. The court of appeals went on to analyze the line of local processing cases cited by the majority in *Carbone* before ultimately concluding that the public nature of the Oneida-Herkimer facilities was a deciding factor on the issue of discrimination. *Id.* at 45a-51a.

The Sixth Circuit in *Daviess* did not address the balance of the Second Circuit's reasoning in *United Haulers*, but concluded with an observation that Daviess County was

acting as a local business in a local industry of waste disposal. 434 F.3d at 912. Daviess County's waste system was not compared to that of Oneida-Herkimer, and any factual similarities or differences between the two were not explored in the decision.

To the extent that a conflict exists between the *Daviess County* and *United Haulers* decisions, it is a shallow one. The *Daviess* court, moreover, was not informed by the subsequent decision rendered by the Second Circuit in *United Haulers II*, made with the benefit of a more complete record and thoughtful analysis by the lower court.

The full import of the reasoning of both *United Haulers I* and *II* has not been directly addressed by any other circuit court, and it may be premature for this Court to grant certiorari on the public/private distinction. The Court may benefit from the percolation of the reasoning of these decisions in the appellate courts, under circumstances where the public/private issue is presented squarely.

The respondents do not disagree with the petitioners as to the importance of this issue. The local power to control the manner of disposal of local waste, within the strictures of the Constitution, goes to the heart of local government's responsibility for the health and safety of its residents. Nor is there disagreement that the issues raised in *United Haulers* will likely continue to be litigated in the courts — not because public agencies seek an economic advantage over private competitors — but because local government remains responsible for public health, and innovative waste management requires the participation of those who collect waste locally.

Consequently, while it is clear that the decisions below are consistent in all respects with the dormant Commerce Clause jurisprudence of this Court, and the existence of a conflict with the Sixth Circuit is shallow at best, it is also clear that the record and reasoning in the decisions below make this case suitable for review, should the Court wish to address the public/private distinction without further delay.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

MICHAEL J. CAHILL
Counsel of Record
GERMANO & CAHILL, PC
4250 Veterans Memorial Highway
Suite 275
Holbrook, New York 11741
(631) 588-8778

JUDY DRABICKI
25723 NYS Rte 180
Dexter, NY 13634-4009

PETER M. RAYHILL
KERNAN & KERNAN P.C.
258 Genesee Street
Utica, NY 13502

Attorneys for Oneida–Herkimer Solid Waste Management Authority

RICHARD A. FRYE
FRYE FOLEY & CARBONE
2219 Genesee Street
Utica, NY 13501

Attorneys for Oneida County NY

THOMAS E. KELLY
HORRIGAN, HORRIGAN, LOMBARDO
& KELLY PC
49 East Main Street
Amsterdam, NY 12010

Attorneys for Herkimer County, NY.

FILED
JUN 5 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1345

In the Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., AND INGERSOLL PICKUP INC.

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, AND COUNTY OF HERKIMER

Respondents.

On Petition for a Writ of Certiorari to United States Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

EVAN M. TAGER
Counsel of Record
MIRIAM R. NEMETZ
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... ii

CONCLUSION 6

TABLE OF AUTHORITIES

Page(s)

Cases:

C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) ..... *passim*

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 5

Huish Detergents, Inc. v. Warren County, 214 F.3d 707 (6th Cir. 2000) 1

Nat'l Solid Waste Mgmt. Ass'n v. Daviess County, 434 F.3d 898 (6th Cir. 2006) ..... *passim*

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) ..... *passim*

SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2d Cir. 1995) 4

Waste Mgmt., Inc. v. Metro. Gov't of Nashville & Davidson Counties, 130 F.3d 731 (6th Cir. 1997) 1

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondents concede that this case is "an appropriate vehicle" for addressing "the distinction between public and private beneficiaries [of flow control] under the dormant Commerce Clause." Opp. 2. They further agree with petitioners that this issue is an "important one[]" (*id.*) that "will likely continue to be litigated in the courts" (*id.* at 15). Despite these fundamental concessions, respondents suggest that the Court should deny certiorari for two reasons. First, they assert that the circuit split is "shallow" (*id.* at 15) and that the Sixth Circuit's reasoning is merely "dicta" (*id.* at 14). Second, they argue that the decision below comports with this Court's prior decisions. *Id.* at 5-13. Neither argument supports denial of the petition.

1. Respondents acknowledge that the Sixth Circuit has held – in square contradiction of the decision below – that a flow control ordinance favoring a publicly owned facility discriminates against interstate commerce and is subject to strict scrutiny under *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). See *National Solid Waste Mgmt. Ass'n v. Daviess County*, 434 F.3d 898 (6th Cir. 2006). Respondents argue, however, that there is "[n]o [t]rue [c]onflict" between *Daviess* and the decision below because the Sixth Circuit's disagreement with the Second Circuit's reading of *Carbone* was "dicta." Opp. 13-14.

There is no merit to this contention. As respondents point out (Opp. 13), before *Daviess*, the Sixth Circuit applied strict scrutiny to flow-control measures favoring publicly owned facilities and thus implicitly rejected the public/private distinction adopted below. See *Huish Detergents, Inc. v. Warren County*, 214 F.3d 707, 716 (6th Cir. 2000); *Waste Mgmt., Inc. v. Metro. Gov't of Nashville & Davidson Counties*, 130 F.3d 731, 736 (6th Cir. 1997). But in none of

the cases did it directly address the issue. In *Daviess*, the County squarely raised the issue – invoking the Second Circuit's decision in this case as support – and the Sixth Circuit in turn squarely rejected the Second Circuit's decision. 434 F.3d at 909-912. Because doing so was absolutely necessary to its resolution of the issue presented to it, the Sixth Circuit's reasoning is not dicta – even if the court was obliged by earlier cases to rule as it did. Indeed, if the Sixth Circuit was bound by prior rulings to reject the public/private distinction, that simply means that the circuit split we have identified pre-dates the *Daviess* decision. It does not mean that there is no split at all.

Respondents next suggest that review is premature because "the *Daviess* court * * * was not informed of the subsequent decision rendered by the Second Circuit in *United Haulers II*, made with the benefit of a more complete record and thoughtful analysis by the lower court." Opp. 15. In *United Haulers II*, however, the Second Circuit confined its analysis to whether the flow control provisions were invalid under *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), and thus examined only whether they imposed burdens on interstate commerce that were "clearly excessive in relation to the putative local benefits." Pet. App. 7a (quoting *Pike*, 397 U.S. at 142). The court "reaffirm[ed]" (Pet. App. 15a), but did not revisit, its ruling in *United Haulers I* that flow-control ordinances favoring public facilities do not discriminate against interstate commerce under *Carbone*. Pet. App. 3a ("In this case, we are called upon to decide whether a nondiscriminatory flow control regulation * * * violates the dormant Commerce Clause"). Accordingly, the opinion in *United Haulers II* does not illuminate the question whether flow-control measures favoring public facilities should be

subject to strict scrutiny. The decision thus would have been of no interest to the court in *Daviess*.[1]

Respondents also argue that the Court should deny review because the split among the circuits is "shallow." Opp. 15. They suggest that the Court may benefit from permitting the issue presented to further "percolat[e]" in the lower courts before resolving it. *Id.* This argument is weightless. Respondents concede that the issue presented is a recurring one that will have to be litigated repeatedly in the trial and appellate courts until this Court resolves it. *Id.*; see also Br. of *Amicus Curiae* Am. Trucking Ass'ns, Inc. and Nat'l Solid Wastes Mgmt. Ass'n in Support of the Petitioners ("ATA/NSWMA Am. Br.") at 5-6. They also concede that "the record and reasoning" in *this* case makes it "suitable for review, should the Court wish to address the public/private distinction without further delay." Opp. 16. Respondents cannot deny that, between them, the Second and Sixth Circuits have fully explored all aspects of this issue. There is no reason to think that waiting for other Circuits to weigh in will either obviate the need to resolve the conflict or frame the arguments any better than they are already framed.

Any marginal benefit that might be gained by waiting for other inferior courts to weigh in on these issues, moreover, is more than outweighed by the cost of continued uncertainty

---

[1] The lower court's ruling on remand also focused exclusively on application of the *Pike* balancing test. See Pet. App. 68a ("[T]he Second Circuit has already deemed the flow control ordinances in this case nondiscriminatory on their face and therefore subject to *Pike*."). Indeed, respondents successfully contended below that the lower court was bound by the terms of the remand to consider only the *Pike* balancing test and could not revisit the question whether strict scrutiny should be applied. See Pet. App. 89a ("[T]his court is duty bound to faithfully comply with that court's narrow and quite specific directive.").

regarding the constitutionality of these widespread measures. As the Second Circuit stated in *United Haulers I* – in a passage quoted by respondents (Opp. 8-9) – the "missing pieces to the constitutional puzzle often force states and municipalities to engage in guesswork about the constitutionality of proposed solid waste management schemes, which are expensive and time-consuming to implement." Pet. App. 32a. Private waste companies also must resort to this difficult "guesswork" when making long-term investments in the development of waste-processing facilities. See ATA/NSWMA Am. Br. at 6. Meanwhile, the continuation of this form of flow control in the Second Circuit and elsewhere threatens long-term damage to the interstate waste management system, which will become more serious the longer the rule established by the decision below persists. See *id.* at 10-14. These factors counsel strongly in favor of resolving the issues presented now.

As the Second Circuit has observed, the federal docket has long been "clogged with – of all things – garbage." *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 504-505 (2d Cir. 1995). This Court and the lower courts already have devoted substantial resources to evaluating the constitutionality of various waste-management measures under the Commerce Clause. This case presents the opportunity for this Court to address one of the most significant remaining open questions regarding the constitutionality of waste-management schemes. The Court should take this opportunity to fill in this important "missing piece[] to the constitutional puzzle" (Pet. App. 32a) without delay.

2. The remainder of respondents' opposition is devoted to arguing that the Second Circuit correctly applied *Carbone* and *Pike*. Opp. 5-13. The petition explains our contrary view that the decisions below conflict with those and other prior rulings of this Court. See Pet. 16-23, 28-30. The *Daviess* opinion and the amicus brief filed in support of the petition (at 15-19) further address the illogic of the public/private

distinction adopted below. Given respondents' concession that this case is a good vehicle for resolving a recurring and important issue regarding the constitutionality of flow control, this Court need not reach the merits of these questions in order to conclude that review is appropriate here. Accordingly, we will not attempt a general response to respondents' merits arguments in this reply brief.

Two of respondents' arguments do merit immediate refutation, however. First, respondents suggest that the Second Circuit's discussion of its findings under *Pike* demonstrates that the ordinances would be upheld even if they were found to discriminate against interstate commerce. Opp. 12-13 & n.3. In fact, it is inconceivable that the flow-control ordinances at issue in this case could survive strict scrutiny. That "virtually *per se* rule of invalidity" (*City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)) is satisfied only "[i]n the rare case where a court finds the local interest compelling and the alternatives [to the discriminatory regulation] non-existent." Pet. App. 37a. Given that hundreds of local governments throughout the country successfully provide waste disposal services and promote waste reduction and recycling while encouraging rather than restricting interstate commerce in waste-related services, respondents cannot hope to show that they have "no other means to advance" their legitimate interests except through protectionist measures. *Carbone*, 511 U.S. at 392.

Respondents also suggest that we argue for a "blanket *per se* prohibition of flow control laws of all kinds." Opp. 1. That is not true. As we note in the petition, for example, flow-control measures have been held not to discriminate against interstate commerce if they provide an exemption for waste destined for out-of-state disposal. See Pet. 24 & n.9. Other types of flow control also may be constitutional. Because the flow-control measures at issue here are functionally indistinguishable from the ordinance invalidated in *Carbone*, however, they plainly violate the Commerce Clause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

EVAN M. TAGER
Counsel of Record
MIRIAM R. NEMETZ
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

JULY 2006

(3)

FILED
JUN 23 2006
OFFICE OF THE CLERK

No. 05-1345

IN THE

Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., and INGERSOLL PICKUP INC.,

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, and COUNTY OF HERKIMER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* AMERICAN TRUCKING ASSOCIATIONS, INC. AND NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION IN SUPPORT OF THE PETITIONERS

ROBERT DIGGES
Deputy General Counsel
American Trucking
Associations, Inc.
2200 Mill Road
Alexandria, Virginia 22314

Counsel for American Trucking Associations, Inc.

DAVID BIDERMAN *
General Counsel
National Solid Wastes
Management Association
4301 Connecticut Avenue, N.W.
Washington, D.C. 20008

Counsel for National Solid Wastes Management Association

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	7
ARGUMENT	8
I. THERE IS A SPLIT BETWEEN THE CIRCUITS ON A CORE COMMERCE CLAUSE ISSUE THAT REQUIRES THE SUPREME COURT'S REVIEW	8
II. THE SECOND CIRCUIT'S EMPHASIS ON FACILITY OWNERSHIP IS AT ODDS WITH MODERN BUSINESS REALITIES AND THIS COURT'S CURRENT COMMERCE CLAUSE JURISPRUDENCE	15
CONCLUSION	19

TABLE OF AUTHORITIES

CASES Page

Am. Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987)..... 8, 16, 17
Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders, 48 F.3d 701 (1995), *reh'g and reh'g en banc denied*, 1995 U.S. App. LEXIS 6454 (3d Cir. Mar. 28, 1995)..... 5
C&A Carbone v. Clarkstown, 511 U.S. 383 (1994)..... *passim*
City of Paterson v. Passaic County Bd. of Chosen Freeholders, 753 A.2d 661 (N.J. 2000)..... 5
City of Philadelphia v. New Jersey, 437 U.S. 617 (1978)..... 7
Coastal Carting Ltd. v. Broward County, 75 F. Supp. 2d 1350 (S.D. Fla. 1999)..... 5
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)..... 8, 16, 17
Condon v. Andino, Inc., 961 F. Supp. 323 (D. Me. 1997)..... 5
Connecticut Carting Co. v. Town of East Lyme, 946 F. Supp. 152 (D. Conn. 1996)..... 10
Harvey & Harvey, Inc. v. County of Chester, 68 F.3d 788 (3d Cir. 1995), *cert. denied*, 516 U.S. 1173 (1996)..... 10
Heier's Trucking, Inc. v. Waupaca County, 569 N.W.2d 352 (Wis. Ct. App. 1997)..... 5
Huish Detergents, Inc. v. Warren County, 214 F.3d 707 (6th Cir. 2000)..... 5
National Solid Waste Mgmt. Ass'n v. Daviess County, 434 F.3d 898 (6th Cir. 2006)..... 5, 6, 8, 9
National Solid Waste Mgmt. Ass'n v. Pine Belt Regional Solid Waste Mgmt. Auth., 389 F.3d 491 (5th Cir. 2004)..... 6

TABLE OF AUTHORITIES—Continued

Page

National Solid Waste Mgmt. Ass'n v. Pine Belt Regional Solid Waste Mgmt. Auth., 261 F. Supp. 2d 644 (S.D. Miss. 2003) 10

Pike v. Bruce Church, 397 U.S. 137 (1970) 7, 9

Pine Ridge Recycling v. Butts County, 855 F. Supp. 1264 (M.D. Ga. 1994) 10

Randy's Sanitation, Inc. v. Wright County, 65 F. Supp. 2d 1017 (D. Minn. 1999) 5

Southcentral Pa. Waste Haulers Ass'n v. Bedford-Fulton-Huntington Solid Waste Auth., 877 F. Supp. 935 (M.D. Pa. 1994) 10

U & I Sanitation v. City of Columbus, 205 F.3d 1063 (8th Cir.), *reh'g and reh'g en banc denied*, 2000 U.S. App. LEXIS 5173 (8th Cir. Mar. 24, 2000) 5, 10, 13, 16

Waste Mgmt., Inc. v. Metro. Gov't, 130 F.3d 731 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998) 5, 10

Waste Mgmt. of Carolinas, Inc. v. New Hanover Cty., No. 93-113 (E.D.N.C. Feb. 21, 2003) 6

Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth., 814 F. Supp. 1566 (M.D. Ala. 1993), *aff'd mem.*, 29 F.3d 641 (11th Cir. 1994) 5

Zenith/Kremer Waste Sys., Inc. v. Western Lake Superior Sanitary Dist., No. 5-95-228, 1996 WL 612465 (D. Minn. July 2, 1996) 10

STATUTES

U.C.C. § 9-202 (2000) 16

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS — Page

House Hearings, Bills & Resolutions

Municipal Solid Waste Flow Control Act of 2001, H.R. 1214, 107th Cong. § 2 (2001) 4

Solid Waste Interstate Transportation Act of 2001, H.R. 1213, 107th Cong. § 2 (2001) 4

Solid Waste Interstate Transportation and Local Authority Act of 1999, H.R. 1190, 106th Cong. § 3 (1999) 4

Municipal Solid Waste Flow Control Act of 1997, H.R. 943, 105th Cong. § 2 (1997) 4

H.R. Res. 349, 104th Cong. § 2 (1996) 4

State and Local Government Interstate Waste Control Act of 1995, H.R. 2323, 104th Cong. (1995) 4

Local Governments Flow Control Act of 1995, H.R. 1085, 104th Cong. § 2 (1995) 4

Public Debt Relief Act of 1995, H.R. 2838, 104th Cong. § 2 (1995) 4

Flow Control Act of 1994, H.R. 4683, 103d Cong. § 1 (1994) 4

Senate Hearings & Bills

Solid Waste Interstate Transportation and Local Authority Act of 2001, S. 1194, 107th Cong. § 3 (2001) 4

Interstate Transportation of Municipal Waste and Flow Control: Hearing on S. 533, S. 663 and S. 872 Before the Senate Comm. On Environment and Public Works, 106th Cong. (1999) 4

Municipal Solid Waste Interstate Transportation and Local Authority Act of 1999, S. 872, 106th Cong. § 5 (1999) 4

TABLE OF AUTHORITIES—Continued

	Page
Solid Waste Interstate Transportation and Local Authority Act of 1999, S. 663, 106th Cong. § 3 (1999)	4
Transportation and Flow Control of Solid Waste: Hearing Before the Senate Comm. on Environment and Public Works, 105th Cong. (1997)	5
Municipal Solid Waste Flow Control Act of 1995, S. 534, 104th Cong. § 202 (1995)	4
Municipal Waste Flow Control Transition Act of 1995, S. 485, 104th Cong. § 2 (1995)	4
Flow Control Act of 1994, S. 2227, 103d Cong. § 2 (1994)	4
House & Senate Reports	
S. Rep. No. 104-52 (1995)	3
H.R. Rep. No. 103-738 (1994)	5
S. Rep. No. 103-322 (1994)	5
MISCELLANEOUS	
Eric Lipton, *City Trash Follows Long and Winding Road*, N.Y. Times, Mar. 24, 2001	12
Chartwell Information, *Directory & Atlas of Solid Waste Disposal Facilities 2003* (7th ed. 2003)	7, 11, 15
James E. McCarthy, *CRS Report for Congress: Interstate Shipment of Municipal Solid Waste: 2004 Update* (Sept. 9, 2004)	11

IN THE

Supreme Court of the United States

No. 05-1345

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., and INGERSOLL PICKUP INC.,

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, and COUNTY OF HERKIMER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* AMERICAN TRUCKING ASSOCIATIONS, INC. AND NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The American Trucking Associations, Inc. (ATA) and National Solid Wastes Management Association ("NSWMA") respectfully submit this brief as *amici curiae* in support of the petition.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* states that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than *amici curiae* and its members, made a

NSWMA is a not-for-profit trade association whose 1700 member companies operate in all fifty states. Collectively, these private sector companies engage in nearly every aspect of solid waste management. NSWMA's members include collectors and transporters of solid waste; operators of solid waste treatment, storage and disposal facilities; waste recyclers; and firms providing legal, financial and consulting services to the waste management industry. NSWMA regularly represents its members in matters before the courts, Congress and regulatory agencies. It filed an *amicus* brief in support of the petitioner in the case of *C&A Carbone v. Clarkstown*, 511 U.S. 383 (1994), in which this Court held that Clarkstown, New York's flow control laws violated the dormant Commerce Clause.

ATA is a nonprofit corporation that serves as the national trade association of the trucking industry. It has over 2,000 direct motor carrier members and, in cooperation with state trucking associations and affiliated national trucking conferences, ATA represents tens of thousands of motor carriers. ATA was created to promote and protect the interests of the trucking industry, which consists of every type and geographical scope of motor carrier operation in the United States, including for-hire carriers, private carriers, leasing companies and others. ATA regularly advocates the trucking industry's position before the United States Supreme Court and other courts. ATA seeks to preserve the interstate market in solid waste and recyclable materials on behalf of the numerous ATA members already engaged in, or planning to become engaged in, the interstate transportation of such materials.

There is currently a split between two of the federal appeals courts on a core dormant Commerce Clause issue—

---

monetary contribution to the preparation or submission of this brief. All parties have consented to this filing in letters on file with the Office of the Clerk of this Court.

what standard applies to a flow control ordinance when the ordinance designates a government-owned waste disposal facility as the sole recipient of waste materials. This split requires Supreme Court resolution, as it is creating uncertainty in many parts of the United States concerning the extent of local government authority over solid waste disposal.

More than four years ago, NSWMA and ATA warned that the Second Circuit's initial decision in this case provides a "blueprint" for local governments to evade their Commerce Clause obligations, and predicted that other localities, including local governments outside the Second Circuit, would use this case as an excuse to prevent waste from entering the interstate market. Brief of Amici Curiae National Solid Wastes Management Association, *et al*, at 6. Unfortunately, this prediction has come true. The past few years have seen a substantial increase in flow control laws and legal challenges to them under the dormant Commerce Clause. In virtually all of these cases, local governments have sought to justify their monopolization of waste flow by citing to the Second Circuit's decisions in this proceeding. Unless reversed by this Court, the decision below threatens to disrupt even further the functioning of the interstate market for solid waste and recycling services. Prior to this Court's decision in *Carbone*, the balkanization of that market was a major threat to the waste industry itself and to the businesses that depend on its services. By 1995, over 75% of the states had authorized flow control laws,[2] and local governments were rushing to take advantage of the opportunity to ensure the success of their local disposal facilities by preventing the waste generated in the locality from being taken anywhere else. The predictable result was an escalation of prices for solid waste disposal, as

---

[2] S. Rep. No. 104-52, at 5-6 (1995) (as of 1995, thirty-five states, the District of Columbia and the Virgin Islands directly authorized flow control, and an additional four states indirectly authorized it through local solid waste management plans, home rule or other mechanisms).

protected facilities set their rates without fear of competition. Moreover, a snowball effect was rapidly developing, as other localities were forced to respond by enacting their own flow control laws to protect local facilities which previously had depended on out-of-state waste for their financial viability.

In *Carbone*, this Court unequivocally held that the challenged flow control ordinance discriminated against interstate commerce and that any "local problems," including health and environmental problems, could be solved by "the unobstructed flow of interstate commerce itself. . . ." 511 U.S. at 393. However, localities with existing flow control laws did not acquiesce gracefully to this Court's decision. In addition to seeking legislation from Congress specifically authorizing flow control laws (which was vigorously opposed by NSWMA),[3] localities sought to perpetuate flow control by

---

[3] *See, e.g.*, Solid Waste Interstate Transportation Act of 2001, H.R. 1213, 107th Cong. § 2 (2001); Municipal Solid Waste Flow Control Act of 2001, H.R. 1214, 107th Cong. § 2 (2001); Solid Waste Interstate Transportation and Local Authority Act of 2001, S. 1194, 107th Cong. § 3 (2001); Solid Waste Interstate Transportation and Local Authority Act of 1999, H.R. 1190, 106th Cong. § 3 (1999); Solid Waste Interstate Transportation and Local Authority Act of 1999, S. 663, 106th Cong. § 3 (1999); Municipal Solid Waste Interstate Transportation and Local Authority Act of 1999, S. 872, 106th Cong. § 5 (1999); Municipal Solid Waste Flow Control Act of 1997, H.R. 943, 105th Cong. § 2 (1997); H.R. Res. 349, 104th Cong. § 2 (1996); State and Local Government Interstate Waste Control Act of 1995, H.R. 2323, 104th Cong. (1995); Local Governments Flow Control Act of 1995, H.R. 1085, 104th Cong. § 2 (1995); Public Debt Relief Act of 1995, H.R. 2838, 104th Cong. § 2 (1995); Municipal Waste Flow Control Transition Act of 1995, S. 485, 104th Cong. § 2 (1995); Municipal Solid Waste Flow Control Act of 1995, S. 534, 104th Cong. § 202 (1995); Flow Control Act of 1994, H.R. 4683, 103d Cong. § 1 (1994); Flow Control Act of 1994, S. 2227, 103d Cong. § 2 (1994); *Interstate Transportation of Municipal Waste and Flow Control: Hearing on S. 533, S. 663 and S. 872 Before the Senate Comm. on Environment and Public Works*, 106th Cong. (1999); *Transportation and Flow Control of Solid Waste: Hearing Before the Senate Comm. on*

attempting to distinguish their particular laws from those struck down in *Carbone* and by making cosmetic changes to their ordinances. Another wave of litigation ensued, and the courts once again became "clogged with cases challenging restrictions on waste-related services, making garbage the modern legal battleground over the Commerce Clause." *Huish Detergents, Inc. v. Warren County*, 214 F.3d 707, 713 (6th Cir. 2000). The courts promptly overturned many of these laws,[4] and localities gradually have been brought into compliance with their Commerce Clause obligations.

The decision of the Second Circuit, Pet. App. at 1a-33a, threatens to undo much that has been accomplished. In response to the Second Circuit's initial 2001 decision in this case, 261 F.3d 245, local governments throughout the United States have enacted flow control laws that rely on the Second Circuit's novel interpretation of *Carbone* and the dormant Commerce Clause. See *National Solid Waste Mgmt. Ass'n v. Daviess County*, 434 F.3d 898 (6th Cir. 2006); *National Solid Waste Mgmt. Ass'n v. Pine Belt Regional Solid Waste Mgmt.*

Environment and Public Works, 105th Cong. (1997); S. Rep. No. 103-322 (1994); H.R. Rep. No. 103-738 (1994).

[4] *See, e.g., Huish Detergents*, 214 F.3d at 715-16; *U & I Sanitation v. City of Columbus*, 205 F.3d 1063 (8th Cir.), *reh'g and reh'g en banc denied*, 2000 U.S. App. LEXIS 5173 (8th Cir. Mar. 24, 2000); *Waste Mgmt., Inc. v. Metro. Gov't.* 130 F.3d 731 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998); *Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders*, 48 F.3d 701, 712 (1995), *reh'g and reh'g en banc denied*, 1995 U.S. App. LEXIS 6454 (3d Cir. Mar. 28, 1995); *Coastal Carting Ltd. v. Broward County*, 75 F. Supp. 2d 1350 (S.D. Fla. 1999); *Randy's Sanitation, Inc. v. Wright County*, 65 F. Supp. 2d 1017 (D. Minn. 1999); *Condon v. Andino, Inc.*, 961 F. Supp. 323 (D. Me. 1997); *Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth.*, 814 F. Supp. 1566 (M.D. Ala. 1993), *aff'd mem.*, 29 F.3d 641 (11th Cir. 1994); *City of Paterson v. Passaic County Bd. of Chosen Freeholders*, 753 A.2d 661 (N.J. 2000); and *Heier's Trucking, Inc. v. Waupaca County*, 569 N.W.2d 352 (Wis. Ct. App. 1997).

Auth., 389 F.3d 491 (5th Cir. 2004); *Waste Mgmt. of Carolinas, Inc. v. New Hanover Cty.*, No. 93-113 (E.D.N.C. Feb. 21, 2003).

In the *Daviess County* case, the Sixth Circuit expressly "decline[d] to adopt" the "private-public distinction" created by the Second Circuit in this case. 434 F.3d at 909. Characterizing the Second Circuit's decision as "surprising," *id.* at 910, the Sixth Circuit stated it "respectfully disagrees with the Second Circuit on the proposition that *Carbone* lends support for the public-private distinction drawn by that court." *Id.* Unless this Court resolves this conflict, local governments, waste haulers and landfills will remain confused as to the application of the dormant Commerce Clause to flow control laws, and local governments will be encouraged to enact such laws.

For example, just last month, NSWMA filed an amicus brief in *Quality Compliance Services, Inc. v. Dougherty Cty.*, No. 05-19 (M.D. Ga.) in opposition to flow control laws recently enacted by two local governments in Georgia. The continued enactment of anti-competitive flow control laws and the conflict between the Circuits on this core dormant Commerce Clause issue demonstrate the national scope and immediacy of this issue for the solid waste industry and its customers.

The decision below provides a blueprint by which a municipality, county or state can readily re-activate flow control as to any publicly owned facility and extend flow control to privately owned facilities by the simple expedient of restructuring its financial arrangement with such facility to vest ownership in a public entity. Given the active and continued resistance of many local, county and state governments to this Court's *Carbone* decision, and based on the recent surge in local flow control laws throughout the United States, *amici* have no doubt that local, county and state governments will be quick to take advantage of this new opportunity. Prompt

review by the Court is thus essential to ensure that the interstate trade in solid waste and recyclables and the constitutional principles underlying the Commerce Clause are not once again thwarted.

SUMMARY OF ARGUMENT

There is a split between the Second and Sixth Circuits that requires review on an important Commerce Clause issue. The Second Circuit has ruled that such flow control laws are not subject to the "virtually per se rule of invalidity" applicable to discriminatory laws, *see City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978), but are instead reviewed under an unusual interpretation of the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Unless resolved, all entities interested in waste management—including local and state governments, waste haulers, landfills and others—will be confused with regard to the scope of a local government's flow control authority under the dormant Commerce Clause. This confusion is evident by the increase in flow control laws possed by local governments since the Second Circuit's initial decision in this case in 2001.

Over 60 percent of the nation's waste facilities currently are owned by public entities.[5] The Second Circuit's decision, by providing a blueprint for governments to evade *Carbone*, virtually ensures that flow control laws will be enacted with respect to many of those facilities, thereby locking millions of tons of waste out of the interstate market. Such effects will not be limited to states in the Second Circuit. Waste from those states currently is moving to facilities in at least nine other Northeastern and Midwestern states. Indeed, since the Second Circuit's initial decision in this case, local govern-

---

[5] Chartwell Information, *Directory & Atlas of Solid Waste Disposal Facilities 2003*, Table 2 at vii (7th ed. 2003) (62% of waste facilities are publicly owned).

ments in Kentucky (Daviess County) and Mississippi (Pine Belt Regional Solid Waste Management Authority) have adopted flow control laws, relying on the Second Circuit's erroneous interpretation of *Carbone* and the dormant Commerce Clause.

The Second Circuit's decision is at odds with both modern business realities and this Court's current Commerce Clause jurisprudence. By making the constitutionality of a flow control ordinance turn on the technical issue of ownership of the favored facility, the court below has ignored the practical economic effect of the ordinance—which this Court repeatedly has emphasized is the key determinant when analyzing issues of discrimination against interstate commerce. *Am. Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987) ("*ATA*"); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The effect of flow control on competing out-of-state waste facilities and on the haulers, interstate trucking companies, railroads and barge lines that seek to transport waste to those facilities is the same regardless of whether the favored local facility is privately or publicly owned. The effect also will be felt by the generators who use these facilities. This Court, in *Carbone*, already has concluded that the economic effects of flow control are "interstate in reach," 511 U.S. at 389, and that such laws discriminate against interstate commerce. A difference in the ownership of the facilities favored by a flow control ordinance cannot change that reality.

ARGUMENT

I. THERE IS A SPLIT BETWEEN THE CIRCUITS ON A CORE COMMERCE CLAUSE ISSUE THAT REQUIRES THE SUPREME COURT'S REVIEW

There is a split in authority between the Second Circuit and the Sixth Circuit's decision in *National Solid Wastes Mgmt. Ass'n. v. Daviess Cty.*, 434 F.3d 898 (6th Cir. 2006) over

whether the *Pike* balancing test, 397 U.S. at 142, applies when a flow control ordinance designates a government-owned waste disposal facility as the recipient of waste. In the decision below, the Second Circuit ruled that *Pike* applies in such situations. In *Daviess County*, the Sixth Circuit expressly declined to follow its sister court's "surprising" interpretation of the *Carbone* decision. 434 F.3d at 909-912. Carefully parsing and analyzing the language of *Carbone*, it concluded that "[f]or every sentence in the decision that can be interpreted as supporting such a distinction, there is a sentence that can be interpreted in opposition." *Id.* at 910. The Sixth Circuit also found the Second Circuit's interpretation of other dormant Commerce Clause decisions to be "similarly strained." *Id.* at 912.

Indeed, until the Second Circuit's decision, it was understood by all parties with a stake in solid waste disposal—including municipalities and counties as well as solid waste facility operators, recyclers and haulers—to apply to privately owned and publicly owned facilities alike. This seemed apparent from *Carbone* itself, where the transfer station protected by the flow control ordinance was privately owned at the time of the litigation but was scheduled to revert to municipal ownership shortly after the Court issued its decision.[6] Yet despite the filing of an amicus brief urging this Court to limit its decision to privately owned facilities[7] and a vigorous dissent urging that the Clarkstown ordinance be upheld because the "one proprietor so favored is essentially an agent of the municipal government,"[8] the majority opinion did not even hint that the constitutionality of the ordinance might

---

[6] *Carbone*, 511 U.S. at 383.

[7] *See* Brief of *Amicus Curiae* City of Springfield, Missouri at 11-15, *Carbone* (No. 92-1402).

[8] *Carbone*, 511 U.S. at 416 (Souter, J., dissenting). Moreover, the Clarkstown ordinance on its face referred to the designated transfer station as "the Town of Clarkstown solid waste facility. . . ." *Id.* at 396.

hinge on whether the case was decided before or after Clarkstown exercised its option to purchase the facility.

In the immediate aftermath of *Carbone*, at least three courts of appeals and two district courts invalidated flow control laws where the facility at issue was publicly owned.[9] Moreover, several district courts that had occasion to address the significance of public versus private ownership of waste facilities both concluded that public ownership made no difference.[10] In this context, the current confusion created by the recent split between the Circuits extends far beyond the Second Circuit.

First, as to the immediate impact, the states that lie within the Second Circuit—New York, Connecticut and Vermont—

---

[9] *See U & I Sanitation*, 205 F.3d at 1065-66, 1071-72 (city-owned transfer station); *Waste Mgmt.*, 130 F.3d at 733, 736 (publicly owned waste-to-energy facility); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 794 (3d Cir. 1995) (county owned landfills), *cert. denied*, 516 U.S. 1173 (1996); *Zenith/Kremer Waste Sys., Inc. v. Western Lake Superior Sanitary Dist.*, No. 5-95-228, 1996 WL 612465, at **1-3, 10 n.13 (D. Minn. July 2, 1996) (waste-to-energy facility owned by waste district); and *Connecticut Carting Co. v. Town of East Lyme*, 946 F. Supp. 152, 154 (D. Conn. 1996) (publicly owned waste disposal plant).

[10] *See National Solid Wastes Mgmt. Ass'n v. Pine Belt Solid Waste Mgmt. Auth.*, 261 F.Supp.2d 644 (S.D. Miss. 2003) (rejecting Second Circuit's analysis of *Carbone*), *rev'd on other grounds*, 389 F.3d 491 (5th Cir. 2004); *Southcentral Pa. WasteHaulers Ass'n v. Bedford-Fulton-Huntingdon Solid Waste Auth.*, 877 F. Supp. 935, 943 (M.D. Pa. 1994) (invalidating a flow control law and stating that the Court was "not persuaded that the public nature of the [designated] facility changes the applicable analysis"). *See also Pine Ridge Recycling v. Butts County*, 855 F. Supp. 1264, 1275 (M.D. Ga. 1994) (finding that local government officials "engineered to prohibit a competitor from entering the waste disposal market" in order to subsidize construction of a new publicly owned landfill, and explaining that "[i]t should make little difference that the [waste authority] owns its [landfill] currently and the facility in Carbone would be turned over to the town after five years of private operation. Such a distinction would focus on form and ignore substance.").

are among the most prolific waste-exporting states in the Nation, and the states that currently receive waste from New York, Connecticut and Vermont include states located in five Circuits. New York alone exported more than 8 million tons of waste in 2003, including 3.7 million tons to Pennsylvania, 1.7 million tons to Virginia, 1.6 million tons to New Jersey, 887,000 tons to Ohio, and smaller quantities of waste to Georgia, Massachusetts, Michigan and West Virginia. Connecticut exported more than 634,000 tons of waste in 2003, including 283,157 tons to Pennsylvania, 234,311 tons to Ohio, and smaller quantities to Massachusetts, Michigan and New York. Vermont exported 126,159 tons of waste in 2002, primarily to New Hampshire and New York.[11] Moreover, a high percentage of the 569 waste facilities in the Second Circuit are publicly owned: over 80% in Connecticut, over 75% in New York, and over 75% in Vermont. Thus, if the Second Circuit's decision is not overturned, local governments in these states will be free to re-institute flow control laws with respect to over 80% of the transfer stations, nearly 70% of the landfills, and over 70% of the waste-to-energy facilities in the region, thereby depriving competitors in at least eight other states of the solid waste now moving to out-of-state facilities in the free interstate market.[12] Overall, millions of tons of solid waste are susceptible to immediate "hoarding" by trash-hungry localities in the Second Circuit if the decision below is allowed to stand.

Indeed, the entire intricate web of solid waste companies and facilities that provide cost-effective service to residents, businesses and local governments in the Northeast and throughout the United States will be impacted adversely unless the Second Circuit's decision is overturned. Many

---

[11] James E. McCarthy, *CRS Report for Congress: Interstate Shipment of Municipal Solid Waste: 2004 Update* at Tbl. 4 (Sept. 9, 2004).

[12] *Directory & Atlas of Solid Waste Disposal Facilities 2003*, *supra* note 5, at 160-76, 628-702, 942-55.

local and national waste collection companies in the Northeast and elsewhere collect trash and dispose of it at transfer stations owned by private waste companies. These companies, in turn, contract with long-haul trucking companies, railroads or barges to transport trash from the transfer stations to landfills and waste-to-energy plants in other states.[13] In New York, numerous waste collectors operating in counties with publicly-owned disposal facilities currently dispose of waste at facilities in other states. If the Court does not overturn the decision below, local governments in those counties will be able to initiate monopolies, or reestablish their pre-*Carbone* monopolies, on solid waste disposal services. This will have immediate adverse consequences for companies that have acquired, constructed or expanded state-of-the-art facilities in other states in reliance on the assumption that they would be able to compete freely in the interstate market for the solid waste needed to operate those facilities efficiently.

The Second Circuit's decision similarly threatens the interstate market in recyclables, as flow control measures often encompass recyclable materials in addition to solid waste.[14] Flow control measures restricting delivery of recyclables to local, publicly owned facilities to the detriment of competing out-of-state facilities will seriously disrupt the interstate

---

[13] In New York City alone, more than 250 licensed haulers collect commercial and industrial solid waste. Virtually all of the thousands of tons of New York City solid waste collected daily by these haulers is processed at transfer stations and disposed of at landfills or waste-to-energy plants in New Jersey, Pennsylvania, Virginia, Ohio and other states. *See* Eric Lipton, *City Trash Follows Long and Winding Road*, N.Y. Times, Mar. 24, 2001.

[14] In the case at bar, the local flow control ordinances apply to both solid waste and recyclables. Pet. App. at 4a-5a.

market for recyclables and the industries that depend on that market.[15]

Counties and municipalities in other Circuits can hardly be expected to stand idly by while those in the Second Circuit take advantage of their new-found ability to hoard waste for their publicly owned facilities. In Pennsylvania, for example, which received more than 3.7 million tons of waste from New York in 2003, or in other states, a loss of waste originating in New York will undoubtedly lead to flow control laws as local governments act to hoard all of their own "homegrown" product. The resulting spiral of protectionist legislation is precisely the evil that *Carbone* was intended to halt. *See Carbone*, 511 U.S. at 390 ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.").

Nor will the effects of the Second Circuit's decision be limited to those facilities that are publicly owned at this moment in time. New facilities will undoubtedly be structured so as to incorporate public ownership. Moreover, there is nothing to prevent a county or municipality that is currently providing financial support to a privately owned facility (as Clarkstown did in *Carbone*) from restructuring its relationship with the private company so as to vest ownership in a public body—and thereby make itself eligible for flow control. Under the Second Circuit's decision, there is no requirement that the waste facility be publicly owned from the outset. Presumably a formerly private facility converted to a publicly owned facility would be entitled to the benefit of flow control laws once the conversion had been accom-

---

[15] *See, e.g., U & I Sanitation*, 205 F.3d at 1069 (discussing the interstate effect of flow control on the recyclables market).

plished.[16] Nor does the Second Circuit's decision require the city or county itself to become the owner of the facility. Indeed, in this case the two counties involved created a "waste management authority" to acquire ownership of the facilities.[17] And because the "public owner" is free under the Second Circuit's decision to hire a private company to actually operate the facility,[18] there is little, if any, disincentive to conversion.

Given the enormous financial benefits that flow control laws can bring to a local government, there can be little doubt that counties and municipalities will quickly move to take advantage of the conversion option wherever possible. While this will necessarily require the cooperation of existing private owners, the monopoly profits made possible by flow control should be more than enough to outweigh the costs of conversion and make the conversion desirable for both the local government and the private owner. Thus, the financial balance is likely to weigh heavily in favor of conversion, further exacerbating the pernicious effects of the decision below.

---

[16] Under the Second Circuit's rationale, it would appear that even Clarkstown, New York — whose flow control ordinance was declared unconstitutional by this Court in *Carbone* — could attempt to argue that its ordinance will become constitutional the moment it exercises its option to purchase the facility.

[17] Under the agreement between the Counties and the waste management authority, the Authority is to manage and dispose of all solid waste within the Counties and operate the local energy recovery facility and recycling center. In return, the Counties guarantee the Authority's operating costs and debt service payments. Pet. App. at 26a. As a practical matter, such an arrangement is virtually indistinguishable from the arrangement in *Carbone* between the city and the owner of the favored facility.

[18] Pet. App. at 28a.

II. THE SECOND CIRCUIT'S EMPHASIS ON FACILITY OWNERSHIP IS AT ODDS WITH MODERN BUSINESS REALITIES AND THIS COURT'S CURRENT COMMERCE CLAUSE JURISPRUDENCE.

The essential premise of the Second Circuit's decision is that there is such a fundamental difference between privately owned and publicly owned waste facilities that a different set of Commerce Clause principles should apply. This premise, however, is simply wrong. In today's world, public and private waste facilities are equal in the eyes of regulators and the market. The decision as to whether a particular facility should be structured as a publicly owned or privately owned entity is, but for the Second Circuit's decision, typically driven by practical business considerations, such as the most advantageous financing mechanism, potential tax consquences, and potential liability issues, that are wholly unrelated to the theoretical concepts that underlie the Second Circuit's decision.

In this context, it makes no sense to conclude, as did the Second Circuit, that the constitutionality of flow control laws enacted to funnel all trash in the jurisdiction to a local facility should turn on whether that facility is publicly or privately owned. This is highlighted by the fact that in over 500 counties throughout the United States, including dozens of counties in New York alone, there is a mix of privately owned and publicly owned waste facilities.[19] In such counties, private sector landfills, waste-to-energy facilities and transfer stations compete directly with publicly owned facilities for solid waste. Under the Second Circuit's decision, a flow control law would be valid as to the publicly owned facilities in these counties and invalid as to the privately owned facilities, even though the difference in ownership has no practical impact

---

[19] *Directory & Atlas of Solid Waste Disposal Facilities 2003*, *supra* note 5, at 628-702.

either on the way in which the flow control law affects interstate commerce or on the day-to-day operation of the facilities. In this light, the Second Circuit's conclusion that a flow control law favoring government owned facilities imposes an "insubstantial burden" on interstate commerce under *Pike* makes little sense. Further, the application of *Pike* below is in conflict with several appeals court decisions. See, e.g., *U&I Sanitation*, 205 F.3d at 1069-72. The constitutionality of a flow control law would thus turn not on an ordinance's effect on interstate commerce, but on the mere happenstance of who holds ownership in the particular facilities.

This myopic focus on ownership is at odds with both the general thrust of modern business law and this Court's current Commerce Clause jurisprudence. From the business law perspective, the clear trend is to look to the substance of a transaction, rather than technical ownership. A prime example is found in Article 9 of the Uniform Commercial Code ("UCC"), which has been adopted by all fifty states and the District of Columbia. Since 1962, the UCC has provided that the location of title to collateral (*i.e.*, ownership) generally is immaterial for purposes of determining the rights and duties of parties to a secured transaction.[20] This simply reflects the reality that property ownership is no longer of talismanic significance in business transactions. The Second Circuit's "form over substance" approach is also contrary to this Court's current Commerce Clause jurisprudence. Addressing the Commerce Clause issues raised by certain state taxes on interstate motor carriers, this Court in *ATA* emphasized that it had "'moved toward a standard of permissibility of state taxation, based upon its actual effect rather than its legal terminology.'" 483 U.S. at 295 (quoting *Complete Auto Transit v. Brady*, 430 U.S. 274, 281 (1977)). Eschewing the

---

[20] *See* U.C.C. § 9-202 (2000).

"metaphysical approach to the Commerce Clause that focused primarily on the character of the privilege rather than the practical consequences of the tax," *id.* at 294-95, the Court evaluated the constitutionality of the challenged taxes on the practical basis of "whether the tax produces a forbidden effect." *Complete Auto Transit*, 430 U.S. at 288. The same approach was followed in *Carbone*, where this Court focused on the fact that the "economic effects [of the flow control law] are interstate in reach" and concluded that "[t]hese economic effects are more than enough to bring the Clarkstown ordinance within the purview of the Commerce Clause." 511 U.S. at 389.

From a practical standpoint, it is clear that the "effect" of local flow control laws on interstate commerce is no different when the favored local facility is publicly owned than when it is privately owned. In either case, the "guarantee of a free trade area among States," 483 U.S. at 281, is violated when a local government forces all trash in its jurisdiction to go to a local facility. From the perspective of the out-of-state waste facilities that can no longer compete for trash generated in a particular county or municipality, it is irrelevant whether the local facility that is the beneficiary of the flow control ordinance is owned by a private entity or by the local waste authority. In either event, the "protectionist effect of the ordinance," *Carbone*, 511 U.S. at 392, is the same—the locally generated waste is hoarded for the benefit of the local facility and the out-of-state competitors are shut out of the market.

Similarly, the effect on the local trash haulers is the same, regardless of whether the facility designated by the flow control laws is publicly owned or privately owned. In either case, those haulers who had been hauling trash to out-of-state waste facilities will now have to take that trash to the designated local facility—and pay the higher tipping fee

charged by that facility.[21] They too are being deprived of access to the interstate market for solid waste services, contrary to the precepts of the Commerce Clause. Regardless of whether flow control laws favor publicly or privately owned facilities, the ripple effect of such laws will be felt throughout the interstate transportation industry. A revitalization of flow control or confusion about its constitutionality under the Commerce Clause due to the current split between the Second and Sixth Circuits will prevent railroads and barges from accessing the interstate market for solid waste services. Railroads and barge lines increasingly are entering into contracts for the long-distance transport of high volumes of trash to out-of-state disposal facilities. By forcing waste to be taken to local facilities, flow control laws of the sort permissible under the Second Circuit's decision will adversely impact those railroads and barges already engaged in, or planning to become engaged in, the interstate transportation of waste by rail and inland waterways, respectively.

The Second Circuit's decision will affect not only those businesses specifically engaged in the interstate transportation of waste, but the multitude of ordinary businesses that generate waste. Most obviously, the creation of local government monopolies over solid waste disposal will prevent such waste generators from reaping the benefits of a competitive marketplace for disposal services, including the ability to shop for price, quality of service, and indemnification from environmental liability. The Second Circuit's belief that a flow control law forcing trash to go to a publicly owned facility is "less likely to give rise to retaliation and jealousy from neighboring states," Pet. App. at 48a, than one that forces trash to go to a privately owned facility is simply

---

[21] As the Second Circuit previously recognized in the case at bar, "[e]ven the lowest tipping fee charged under the Counties' scheme is higher than the market value for the disposal services the Authority provides." Pet. App. at 29a.

naïve. The effect on an out-of-state waste facility that is shut out of a market by flow control is the same, regardless of who owns the favored facility, as is the effect on the municipality or county in which that out-of-state facility is located. A local government in a neighboring state that finds its financial well-being jeopardized by the loss of business experienced by its own waste facility is unlikely to eschew "retaliatory" measures simply because the flow control law responsible for its problems is directing waste to a publicly owned, rather than a privately owned, facility. Realistically, each local jurisdiction will act to protect its own interests—including, when necessary, retaliatory measures against other localities. This is precisely what the Commerce Clause was intended to prevent.

CONCLUSION

For the reasons stated herein, the petition for certiorari should be granted and the decision below should be reversed.

Respectfully submitted,

ROBERT DIGGES
Deputy General Counsel
American Trucking
Associations, Inc.
2200 Mill Road
Alexandria, Virginia 22314

Counsel for American Trucking Associations, Inc.

DAVID BIDERMAN *
General Counsel
National Solid Wastes
Management Association
4301 Connecticut Avenue, N.W.
Washington, D.C. 20008

Counsel for National Solid Wastes Management Association

* Counsel of Record

Supreme Court, U.S.
FILED
NOV 7 - 2006
OFFICE OF THE CLERK

(18)

No. 05-1345

In the Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., AND INGERSOLL PICKUP INC.,

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, AND COUNTY OF HERKIMER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

EVAN M. TAGER
Counsel of Record
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioners

MICHAEL J. CAHILL
Counsel of Record
Germano & Cahill, P.C.
Suite 275
4250 Veterans Mem'l Hwy.
Holbrook, NY 11741
(631) 588-8778

Counsel for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

PETITION FOR CERTIORARI FILED APRIL 21, 2006
CERTIORARI GRANTED SEPTEMBER 26, 2006

TABLE OF CONTENTS

Page

Relevant Docket Entries

U.S. District Court for the Northern District of New York 1a

U.S. Court of Appeals for the Second Circuit, No. 00-7593 ..... 23a

U.S. Court of Appeals for the Second Circuit, No. 05-2024-cv 28a

Complaint (filed Apr. 14, 1995) 31a

Defendant Oneida-Herkimer Solid Waste Management Authority's Answer (filed June 14, 1995) 53a

Note: The separate answers of Defendants County of Oneida and County of Herkimer have been omitted in order to avoid repetition.

Waste Disposal Agreement dated June 28, 1991, Exhibit 1 to Affidavit of Kristen Carter Rowe in Support of Plaintiffs' Motion for Summary Judgment (filed July 27, 1995) (Excerpts) 69a

Affidavit of Steven R. Kowalsky (filed July 27, 1995) 96a

Affidavit of Hans G. Arnold (filed May 16, 2003) 105a

Final Local Solid Waste Management System Plan dated May 29, 1991, Exhibit 37 to Affidavit of Hans G. Arnold (filed May 16, 2003) 140a

Page

Exhibits to the Affidavit of Kevin C. Murphy in Support of Plaintiffs' Motion for Partial Summary Judgment (filed May 16, 2003)

8. Letter from Michael Houseknect to Hans G. Arnold (Mar. 19, 1987) and attached Memorandum to Majority Senators (Mar. 9, 1987) 168a

29. Oneida-Herkimer Solid Waste Management Authority Financial Statements and Report of Independent Certified Public Accountants (Dec. 31, 2001 and 2000) (excerpts) 174a

30. Solid Waste Transporting and Disposal Agreement (Nov. 30, 1998) (excerpts) 176a

31. Expert Report of Mark P. Berkman (Nov. 15, 2002) 191a

32. NWSMA Research Bulletin 02-01, Interstate Movement of Municipal Solid Waste (Feb. 2002) 239a

38. Affidavit of David N. Levitt (with attachments) (June 2, 1995) 253a

39. Affidavit of Jeff Bliss (with attachments) (June 7, 1995) 269a

40. Affidavit of Marcella Guerriero (with attachments) (June 10, 1995) 292a

43. Letter from Hans G. Arnold to Richard Lynch (Feb. 1, 2001) 296a

Page

44. Letter from Hans G. Arnold to Residents and Businesses of Oneida and Herkimer Counties.....300a

45. Excerpt from Draft Environmental Impact Statement for Site WLE-5 East (Jan. 1998).....304a

46. Memorandum from Hans G. Arnold to John D. Plumley and Robert F. Julian, re: Long-Term Financial Analysis (Jan. 4, 1989).....307a

47. Memorandum from John D. Plumley, re Contractual Relationship Between the Counties and the Oneida-Herkimer Solid Waste Management Authority (Nov. 7, 1988).....310a

51. The Cost of Flow Control, Prepared by Mark P. Berkman (May 3, 1995).....315a

Rebuttal Report of Mark P. Berkman dated January 29, 2003, Exhibit 64 to the Affidavit of Kevin C. Murphy In Support of Plaintiffs' Reply Memorandum In Support of Motion and Cross-Motion for Partial Summary Judgment (filed May 16, 2003).....340a

Attachments to Defendants' Motion for Summary Judgment (filed May 16, 2003)

7. Plaintiffs' Supplemental Response to Defendants' Third Set of Interrogatories (Sept. 12, 2002).....348a

17. Expert Report of Dr. Robert N. Stavins (Jan. 10, 2003).....353a

31. Affidavit of Hans G. Arnold (July 7, 1995).....413a

Page

32. Affidavit of Robert F. Julian (July 5, 1995).....443a

33. Affidavit of Michael Gapin (July 6, 1995).....472a

35. Affidavit of Ronald N. Soltys (July 6, 1995).....493a

Civil Judgment (March 24, 2005) 497a

Note: The following items have been omitted from this Joint Appendix because they appear on the following pages of the Appendix to the Petition for a Writ of Certiorari:

Opinion of the United States Court of Appeals for the Second Circuit (Feb. 16, 2006) 1a

Opinion of the United States Court of Appeals for the Second Circuit (July 27, 2001).....22a

Memorandum Decision and Order of the United States District Court for the Northern District of New York (Mar. 24, 2005).....54a

Report and Recommendation of the United States Magistrate Judge of the United States District Court for the Northern District of New York (Mar. 17, 2004).....75a

Memorandum Decision and Order of the United States District Court for the Northern District of New York (Mar. 31, 2000).....103a

Oneida County Board of Legislators Resolution No. 301 .....118a

Herkimer County Local Law, Introductory No. 1 – 1990 .....131a

U.S. DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK (Syracuse)
Case No. 5:95-cv-00516-NAM-DEP

United Haulers Ass'n., Inc., et al.,
Plaintiffs,
v.
Oneida-Herkimer Solid Waste Management Authority, et al.,
Defendants.

RELEVANT DOCKET ENTRIES

Date Filed	No.	Docket Text
04/14/1995	1	COMPLAINT filed.
06/15/1995	6	ANSWER to Complaint by County of Oneida.
06/15/1995	8	ANSWER to Complaint by Oneida-Herkimer.
06/16/1995	9	ANSWER to Complaint by County of Herkimer.
07/27/1995	14	MOTION by United Haulers Assn., Transfer Systems Inc, Bliss Enterprises, Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial, Ingersoll Pickup Inc for Summary Judgment, Hearing set for 10:00 8/21/95 Motion returnable before Judge/Mag. Judge: Pooler (Statement of Undisputed Facts attached).
07/27/1995	15	AFFIDAVIT of KRISTIN CARTER ROWE, ESQ. on behalf

Date Filed	No.	Docket Text
		of United Haulers Assn., Transfer Systems Inc, Bliss Enterprises, Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial, Ingersoll Pickup Inc Re: [14-1] motion for Summary Judgment (Exhibits A-N attached).
07/27/1995	16	AFFIDAVIT of DAVID N. LEVITT on behalf of United Haulers Assn., Transfer Systems Inc, Bliss Enterprises, Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial, Ingersoll Pickup Inc Re: [14-1] motion for Summary Judgment (Exhibits A-D attached).
07/27/1995	17	AFFIDAVIT of JEFF BLISS on behalf of United Haulers Assn., Transfer Systems Inc, Bliss Enterprises, Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial, Ingersoll Pickup Inc Re: [14-1] motion for Summary Judgment (Exhibit A & B attached).
07/27/1995	18	AFFIDAVIT of MARCELLA GUERRIERO on behalf of United Haulers Assn., Transfer Systems Inc, Bliss Enterprises, Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial,

Date Filed	No.	Docket Text
		Ingersoll Pickup Inc Re: [14-1] motion for Summary Judgment (Exhibits A-B attached).
07/27/1995	19	MEMORANDUM by United Haulers Assn., Transfer Systems Inc, Bliss Enterprises, Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial, Ingersoll Pickup Inc in support of [14-1] motion for Summary Judgment (Exhibits A-D attached).
07/27/1995	22	AFFIDAVIT of PHILIP A. RAYHILL, ESQ. on behalf of Oneida-Herkimer Re: [14-1] motion for Summary Judgment (Exhibits 1-5 attached).
07/27/1995	23	AFFIDAVIT of MICHAEL A. GAPIN on behalf of Oneida-Herkimer in OPPOSITION to [14-1] motion for Summary Judgment.
07/27/1995	24	AFFIDAVIT of ROBERT F. JULIAN on behalf of Oneida-Herkimer Re: [14-1] motion for Summary Judgment (Exhibits 1-11 attached).
07/27/1995	24	Exhibits J-6, J-7 and J-8 in support of Robert Julian's [24-1] Affidavit.
07/27/1995	25	AFFIDAVIT of HANS G.

Date Filed	No.	Docket Text
		ARNOLD on behalf of Oneida-Herkimer Re: [14-1] motion for Summary Judgment (Exhibits A-1 - A-12 attached).
07/27/1995	25	Exhibits A-1, A-2, A-3, A-4, A-5, A-6, A-7, A-8, A-9, A-10 and A-11 in support of Hans Arnold's [25-1] Affidavit.
07/27/1995	25	Exhibit A-12 in support of Hans Arnold's [25-1] Affidavit.
07/27/1995	26	MEMORANDUM by Oneida-Herkimer in opposition to [14-1] motion for Summary Judgment (w/attachments).
07/27/1995	27	AFFIDAVIT of CARRIE MCLOUGHLIN NOLL on behalf of County of Herkimer in OPPOSITION to [14-1] motion for Summary Judgment (AFFIDAVIT of RONALD N. SOLTYS and Proof of Mailing attached).
07/27/1995	28	MEMORANDUM by County of Herkimer in opposition to [14-1] motion for Summary Judgment.
07/27/1995	29	MEMORANDUM by County of Oneida in opposition to [14-1] motion for Summary Judgment.
07/27/1995	30	REPLY by United Haulers Assn., Transfer Systems Inc, Bliss

Date Filed	No.	Docket Text
		Enterprises, Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial, Ingersoll Pickup Inc to response to [14-1] motion for Summary Judgment.
07/27/1995	31	AFFIDAVIT of KEVIN M. YOUNG, ESQ. on behalf of United Haulers Assn., Transfer Systems Inc, Bliss Enterprises, Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial, Ingersoll Pickup Inc Re: [14-1] motion for Summary Judgment (Exhibits A-F attached).
07/27/1995	32	AFFIDAVIT of STEVEN R. KOWALSKY on behalf of United Haulers Assn., Transfer Systems Inc, Bliss Enterprises, Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial, Ingersoll Pickup Inc Re: [14-1] motion for Summary Judgment (Exh. A attached).
07/27/1995	33	AFFIDAVIT of MARCELLA GUERRIERO on behalf of United Haulers Assn., Transfer Systems Inc, Bliss Enterprises, Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial, Ingersoll Pickup Inc Re: [14-1] motion for Summary Judgment (Exhibits A-D attached).

Date Filed	No.	Docket Text
10/16/1995	40	MEMORANDUM by County of Herkimer in further opposition to [14-1] motion for Summary Judgment.
10/17/1995	41	MEMORANDUM by Ingersoll Pickup Inc, Levitt's Commercial, Bristol Trash Removal, Ken Wittman Sanitation, Bliss Enterprises, Transfer Systems Inc, United Haulers Assn. in FURTHER support of [14-1] motion for Summary Judgment.
10/17/1995	44	Supplemental MEMORANDUM of Law by County of Oneida, Oneida-Herkimer in opposition to [14-1] motion for Summary Judgment.
10/23/1995	46	MEMORANDUM of Law by County of Herkimer, County of Oneida, Oneida-Herkimer in opposition to [14-1] motion for Summary Judgment.
10/24/1995	45	REPLY BRIEF IN RESPONSE TO DEFENDANTS' SUPPLEMENTAL MEMORANDA OF LAW by Ingersoll Pickup Inc, Levitt's Commercial, Bristol Trash Removal, Ken Wittman Sanitation, Bliss Enterprises, Transfer Systems Inc, United Haulers Assn. RE: [14-1] motion

Date Filed	No.	Docket Text
		for Summary Judgment.
05/24/1996	71	MINUTE ENTRY of TELEPHONE CONFERENCE w/Judge Pooler: APP: Philip Rayhill, Esq. for Oneida-Herkimer, James O'Shea, Esq. for County of Oneida, Carrie Noll, Esq. for County of Herkimer, Kevin Young, Esq. and Kristin Carter Rowe, Esq. for pltfs. Pltf. makes motion for TRO to prohibit Authority or County from enforcing flow control pending the court's decision on pending motion. Judge does not issue TRO as no irreparable harm can be shown; damages can be measured in dollars.
03/31/2000	83	ORDERED, that the pltf's [14-1] motion for Summary Judgmentis granted on their first cause of action and defts are enjoined from enforcing flow control laws; the United Haulers lacks standing only with respect to the claim under Section 1983, but I grant the remaining pltf's summary judgment on that second cause of action; the matter is referred to Mag. Judge DiBianco for calculation of damages. (signed by Judge Rosemary S. Pooler). Modified on 06/28/2000.

Date Filed	No.	Docket Text
03/31/2000		CASE REFERRED to Magistrate Judge Gustave J. DiBianco for calculations of damages pursuant to [83-1] Order.
04/03/2000		CASE reassigned to Judge Norman A. Mordue.
04/28/2000	85	NOTICE OF APPEAL by Oneida-Herkimer.
04/28/2000	86	NOTICE OF APPEAL by County of Oneida.
04/28/2000	87	NOTICE OF APPEAL by County of Herkimer.
05/08/2000		Notice of appeal and certified copy of docket to USCA re: [87-1] appeal by County of Herkimer, [86-1] appeal by County of Oneida, [85-1] appeal by Oneida-Herkimer.
06/16/2000	89	COURT NOTICE of Reassignment of Action to Hon. David E. Peebles. US Magistrate Judge w/copy Order.
06/16/2000		CASE NO LONGER REFERRED TO Magistrate Judge Gustave J. DiBianco.
06/16/2000		CASE REFERRED to Magistrate Judge David E. Peebles.
07/11/2000		USCA Case Number Re: [87-1]

Date Filed	No.	Docket Text
		appeal by County of Herkimer, [86-1] appeal by County of Oneida, [85-1] appeal by Oneida-Herkimer; USCA #: 00-7593(L), 00-7595 (con) & 00-7597 (con).
12/05/2000	95	Minute entry: Tel. Conf. w/MJ Peebles - MJ Peebles to sign Stipulation & Order substituting Atty. Cahill for Atty. Rayhill; attys. agree that damages phase should be stayed until 2nd Circuit decision on appeal; MJ Peebles to issue order staying case; attys. to notify Court when decision received & further conf. to be scheduled.
12/07/2000	96	LETTER STIPULATION and ORDER dd 12/1/00 by Kevin M. Young, Esq. for pltf and Michael J. Cahill, Esq for defts requesting to Stay discovery pending a decision by the Court of Appeals ; Granted. Upon a decision of the Court of Appeals, the parties shall promptly notify the Mag. Judge of such decision and schedule a further conference of the matter to address remaining issues of discovery, if any. (signed by Magistrate Judge David E. Peebles).
08/24/2001	101	MANDATE OF USCA (certified

Date Filed	No.	Docket Text
		copy dated 8/21/01) Re: [87-1] appeal by County of Herkimer, [86-1] appeal by County of Oneida, [85-1] appeal by Oneida-Herkimer - the judgment of said district court be and it hereby is REVERSED and REMANDED for further proceedings in accordance with the opinion of this Court. The parties shall bear their own costs.
10/02/2001	102	Minute entry of telephone conference held w/MJ Peebles: pltf will be filing a petition for certiorari; matter will be stayed pending petition.
09/24/2002	123	Minute entry of in-person pretrial conference; App: Kevin Murphy, Esq. for UHA, Michael Cahill, Judy Drabicki, Esqs. for defts., Richard Frye, Esq. for Oneida County, Chris Sing, Esq. for Herkimer Co., Clerk C. McNulty; Parties requested bifurcation of liability from damages and for purposes of discovery and MJ Peebles agreed, subject to approval by Judge Mordue; The Parties believe that the liability issue can be decided on the papers although damages might require a non-jury trial; The subject of experts were discussed and an

Date Filed	No.	Docket Text
		agreed upon discovery schedule and expert reports were developed; The parties report that at the present time there is no likelihood of settlement ; set Tel. Conf. for 3:00 1/15/03 (pltf to initiate).
09/27/2002	125	ORDER SUPPLEMENTING THE UNIFORM PRETRIAL ORDER: The UPSO is hereby modified to provide that the Discovery and motion phases of the case shall be bifurcated, with the issue of liability being determined first, followed by a determination through motion, trial or otherwise, of the damages phase if required; The Deadline for completion of Discovery with regard to the liability phase of the case is hereby extended until 2/14/03 inclusive; Plaintiffs expert disclosure is due 11/1/02, defendants expert disclosure due 12/16/02 and Rebuttal Expert Disclosure is due 1/10/03; the deadline for filing dispositive motions remains 4/30/03; All other provisions of the USPO shall remain the same; the procedures and deadlines associated w/the damages phase shall be determined by the Court at a future date, depending on the

Date Filed	No.	Docket Text
		outcome of liability; So Ordered signed by Magistrate Judge David E. Peebles 9/27/02.
04/11/2003	145	MOTION by Kevin C. Murphy, Esq., on behalf of the plaintiffs' for Partial Summary Judgment on the issue of Liability.
04/11/2003	152	MOTION by Michael J. Cahill, Esq., on behalf of the defendants' for Summary Judgment dismissing the complaint and for Attorneys Fees & Costs.
05/02/2003	160	CROSS MOTION by Kevin C. Murphy, Esq., on behalf of the plaintiffs' for Partial Summary Judgment on the issue of Liability.
05/16/2003	146	Statement of Material Facts in Support of [145-1] Motion for Partial Summary Judgment on the issue of Liability filed by plaintiffs.
05/16/2003	147	AFFIDAVIT: by Kevin C. Murphy, Esq., on behalf of the plaintiffs in support of [145-1] Motion for Partial Summary Judgment on the issue of Liability, w/attached exhibits 1 through 24.
05/16/2003	148	PLAINTIFFS' EXHIBITS - VOLUME II, attaching exhibits 25 through 52 in support of [147]

Date Filed	No.	Docket Text
		Affidavit of Kevin C. Murphy, Esq., and [145] Motion for Partial Summary Judgment.
05/16/2003	149	MEMORANDUM OF LAW: by Kevin C. Murphy, Esq., on behalf of plaintiffs' in support of [145-1] Motion for Partial Summary Judgment on the issue of Liability, w/attachment.
05/16/2003	150	Defendants' Response Statement of Material Facts, Re: plaintiffs' [145-1] Motion for Partial Summary Judgment on the issue of Liability.
05/16/2003	151	MEMORANDUM OF LAW: by Michael J. Cahill, Esq., on behalf of the defendants' in opposition to [145-1] Motion for Partial Summary Judgment on the issue of Liability.
05/16/2003	153	Statement of Material Facts in Support of defendants' [152-1] Motion for Summary Judgment dismissing the complaint and for Attorneys Fees & Costs.
05/16/2003	154	AFFIRMATION: by Michael J. Cahill, Esq., on behalf of the defendants' in support of [152-1] Motion for Summary Judgment dismissing the complaint and for Attorneys Fees & Costs.

Date Filed	No.	Docket Text
05/16/2003	155	MEMORANDUM OF LAW: by Michael J. Cahill, Esq., on behalf of the defendants' in support of [152-1] Motion for Summary Judgment dismissing the complaint and for Attorneys Fees & Costs.
05/16/2003	156	AFFIDAVIT: by Hans G. Arnold, Executive Director for the Oneida-Herkimer Solid Waste Management Authority, in support of [152-1] Motion for Summary Judgment dismissing the complaint and for Attorneys Fees & Costs.
05/16/2003	157	NOTICE OF APPENDICES: listed as A through J, filed on behalf of the defendants' in support of [152] Motion for Summary Judgment dismissing the Complaint and for Attorneys' Fees & Costs. (to be considered an attachment to docket [156-1].
05/16/2003	158	AFFIDAVIT: by Richard A. Frye, Esq., on behalf of County of Oneida in support of [152-1] Motion for Summary Judgment dismissing the complaint and for Attorneys Fees & Costs.
05/16/2003	159	AFFIDAVIT: by Krishna K. Singh, Esq., on behalf of County of Herkimer in support of [152-1]

Date Filed	No.	Docket Text
		Motion for Summary Judgment dismissing the complaint and for Attorneys Fees & Costs, w/attached exhibits A through C.
05/16/2003	161	Plaintiffs' Response Statement of Material Facts in Response to defendants' [152-1] Motion for Summary Judgment dismissing the complaint and for Attorneys Fees & Costs, and in support of plaintiffs' [160-1] Cross Motion for Partial Summary Judgment on the issue of Liability.
05/16/2003	162	AFFIDAVIT: by Kevin C. Murphy, Esq., on behalf of the plaintiffs' in support of [160-1] Cross Motion for Partial Summary Judgment on the issue of Liability, w/attached exhibits marked 52 through 60.
05/16/2003	163	MEMORANDUM OF LAW: by Kevin C. Murphy, Esq., on behalf of the plaintiffs' in opposition to [152-1] Motion for Summary Judgment dismissing the complaint and for Attorneys Fees & Costs, and in support of [160-1] Cross Motion for Partial Summary Judgment on the issue of Liability.
05/16/2003	164	REPLY MEMORANDUM OF LAW: by Michael J. Cahill, Esq., on behalf of defendants in

Date Filed	No.	Docket Text
-		response to and in further support of [152-1] Motion for Summary Judgment dismissing the complaint and for Attorneys Fees & Costs.
05/16/2003	165	REPLY AFFIDAVIT: by Kevin C. Murphy, Esq., on behalf of the plaintiffs in response to and in further support of [145-1] Motion for Partial Summary Judgment on the issue of Liability, and [160-1] Cross Motion for Partial Summary Judgment on the issue of Liability, w/attached exhibits marked 61 through 66.
05/16/2003	166	REPLY MEMORANDUM OF LAW: by Kevin C. Murphy, Esq., on behalf of plaintiffs in response to and in further support of [145-1] Motion for Partial Summary Judgment on the issue of Liability, and [160-1] Cross Motion for Partial Summary Judgment on the issue of Liability.
05/16/2003	167	DEFENDANTS' EXHIBITS: Volume I, listing exhibits 1 through 13 in support of defendants' [152] Motion for Summary Judgment dismissing the Complaint and for Attorneys' Fees & Costs.
05/16/2003	168	DEFENDANTS' EXHIBITS:

Date Filed	No.	Docket Text
		Volume II, listing exhibits 14 through 16 in support of defendants' [152] Motion for Summary Judgment dismissing the Complaint and for Attorneys' Fees & Costs.
05/16/2003	169	DEFENDANTS' EXHIBITS: Volume III, listing exhibits 17 and 18 in support of defendants' [152] Motion for Summary Judgment dismissing the Complaint and for Attorneys' Fees & Costs.
05/16/2003	170	DEFENDANTS' EXHIBITS: Volume IV, listing exhibits 19 through 21 in support of defendants' [152] Motion for Summary Judgment dismissing the Complaint and for Attorneys' Fees & Costs.
05/16/2003	171	DEFENDANTS' EXHIBITS: Volume V, listing exhibits 22 through 24 in support of defendants' [152] Motion for Summary Judgment dismissing the Complaint and for Attorneys' Fees & Costs.
05/16/2003	172	DEFENDANTS' EXHIBITS: Volume VI, listing exhibits 25 through 28 in support of defendants' [152] Motion for Summary Judgment dismissing the Complaint and for Attorneys'

Date Filed	No.	Docket Text
		Fees & Costs.
05/16/2003	173	DEFENDANTS' EXHIBITS: Volume VII, listing exhibits 29 and 30 in support of defendants' [152] Motion for Summary Judgment dismissing the Complaint and for Attorneys' Fees & Costs.
05/16/2003	174	DEFENDANTS' EXHIBITS: Volume VIII, listing exhibits 31 through 35 in support of defendants' [152] Motion for Summary Judgment dismissing the Complaint and for Attorneys' Fees & Costs.
05/16/2003	175	DEFENDANTS' EXHIBITS: Volume IX, listing exhibits 36 through 40 in support of defendants' [152] Motion for Summary Judgment dismissing the Complaint and for Attorneys' Fees & Costs.
06/13/2003	180	ORDER: the following motions are referred to Magistrate Judge David E. Peebles to conduct oral argument if necessary and to submit a Report & Recommendation to Judge Mordue for their disposition, Re: [140-1] Motion to Strike the Affidavit of Michael J. Cahill and Affidavit of Richard A. Frye,

Date Filed	No.	Docket Text
		[145-1] Motion for Partial Summary Judgment on the issue of Liability, [152-1] Motion for Summary Judgment dismissing the complaint and for Attorneys Fees & Costs, and [160-1] Cross Motion for Partial Summary Judgment on the issue of Liability (Signed by Judge Norman A. Mordue).
07/23/2003	181	Minute entry: Judge Mordue has requested Judge Peebles to prepare a Report & Recommendation regarding the pending motions for summary judgment. Judge hears oral argument from Atty. Kevin Murphy on behalf of the Pltfs. & Atty. Michael Cahill on behalf of the Defts. Judge reserves decision on the pending motions for summary judgment. A Report & Recommendation will be prepared by Judge Peebles shortly.
03/17/2004	183	REPORT AND RECOMMENDATIONS: Recommending that defendants' [152] Motion for Summary Judgment filed by County of Herkimer, New York, County of Oneida, Oneida-Herkimer Solid Waste Management Authority, be granted and that the [1] Complaint

Date Filed	No.	Docket Text
		be dismissed, recommending that the [145] Motion for Partial Summary Judgment filed by plaintiffs' be denied, recommending that the [160] Cross Motion for Partial Summary Judgment filed by plaintiffs' be denied and further recommending that the [140] Motion to Strike filed by plaintiffs' be granted in part, and that paragraphs five through forty-five of the Cahill Affirmation and paragraphs five through twenty-five of the Frye affidavit be stricken from the record. Objections to R&R due by 4/6/2004. Signed by Judge David E. Peebles on 3/17/04.
04/15/2004	188	OBJECTION to [183] Report and Recommendations by Bliss Enterprises, Inc., Bristol Trash Removal, Ingersoll Pickup Inc, Ken Wittman Sanitation, Levitt's Commercial Containers, Inc., Transfer Systems Inc, United Haulers Association, Inc.
04/26/2004		Motions No Longer Referred to Magistrate Judge Peebles: [160] Motion for Summary Judgment, [145] Motion for Summary Judgment, [140] Motion to Strike, [152] Motion for Summary Judgment.

Date Filed	No.	Docket Text
05/14/2004	189	MEMORANDUM OF LAW In Response to Plaintiffs Objections to Magistrates' Report and Recommendations filed by Oneida-Herkimer Solid Waste Management Authority.
03/24/2005	191	MEMORANDUM-DECISION & ORDER: adopting the [183] Report and Recommendations in its entirety therefore denying plaintiffs' [145] Motion for Summary Judgment, denying plaintiffs' [160] Motion for Summary Judgment, granting in part and denying in part plaintiffs' [140] Motion to Strike, ordered that paragraphs 5 through 45 of the Cahill Affirmation and paragraphs 5 through 25 of the Frye affidavit be stricken from the record, further ordered granting defendants' [152] Motion for Summary Judgment and the complaint is dismissed. Signed by Judge Norman A. Mordue on 3/24/05
03/24/2005	192	JUDGMENT in favor of defendants against plaintiffs.
04/22/2005	193	NOTICE OF APPEAL as to [192] Judgment by United Haulers Association, Inc., Transfer Systems Inc, Bliss Enterprises,

Date Filed	No.	Docket Text
		Inc., Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial Containers, Inc., Ingersoll Pickup Inc.
03/27/2006	199	MANDATE of USCA as to [193] Notice of Appeal, filed by United Haulers Association, Inc., Transfer Systems Inc, Bliss Enterprises, Inc., Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial Containers, Inc., Ingersoll Pickup Inc. The Judgment of the District Court is hereby AFFIRMED in accordance with the opinion of the Second Circuit Court of Appeals. {Issued as a mandate on 3/14/06}.

U.S. COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 00-7593

United Haulers Ass'n., Inc., et al.,
Plaintiffs-Appellees,
v.
Oneida-Herkimer Solid Waste Management Authority, et al.,
Defendants-Appellants.

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
05/10/00	Copy of notice of appeal and district court docket entries on behalf of Appellant Oneida-Herkimer in 00-7593 filed.
05/10/00	Copy of notice of appeal and district court docket entries on behalf of Appellant County of Oneida in 00-7595 filed.
05/10/00	Copy of notice of appeal and district court docket entries on behalf of Appellant County of Herkimer in 00-7597 filed.
08/03/00	Appellant County of Oneida in 00-7593 brief FILED with proof of service.
08/03/00	Appellant Oneida-Herkimer in 00-7593 brief FILED with proof of service.
08/03/00	Appellant Oneida-Herkimer in 00-7593, Appellant County of

Date Filed	Docket Text
	Oneida in 00-7593, Appellant County of Herkimer in 00-7593 joint appendix filed w/pfs. Number of volumes: one.
8/11/00	Appellant County of Herkimer in 00-7593 brief FILED with proof of service.
09/07/00	Appellee United Haulers Assoc in 00-7593, Appellee Transfer Systems, Inc. in 00-7593, Appellee Bliss Enterprises in 00-7593, Appellee Ken Wittman Sanitation in 00-7593, Appellee Bristol Trash Removal in 00-7593, Appellee Levitt's Commercial in 00-7593, Appellee Ingersoll Pickup Inc. in 00-7593 brief filed with proof of service.
09/27/00	Appellant Oneida-Herkimer in 00-7593 reply brief filed with proof of service.
09/29/00	Appellant County of Herkimer in 00-7593 reply brief filed with proof of service.
09/29/00	Appellant County of Oneida in 00-7593 reply brief filed with proof of service.
10/13/00	Amicus Curiae N.Y.S. Assoc. for So in 00-7593 brief filed with proof of service.

Date Filed	Docket Text
11/08/00	Set for argument on 12/19/00.
12/19/00	Case heard before MESKILL, LEVAL, CALABRESI C.JJ. (Tape: #99+100)
12/29/00	Order filed stating: The parties shall submit supplemental briefs by January 26, 2001, addressing the questions listed below. The New York State Association for solid Waste Management is granted leave to submit additional briefing as amicus on these issues. Before: Hon. Meskill, Hon. Leval and Hon. Calabresi, C.JJ. (12/29/00 RAA)
01/26/01	Appellee United Haulers Assoc. in 00-7593, Appellee Transfer Systems, Inc. in 00-7593, Appellee Bliss Enterprises in 00-7593, Appellee Ken Wittman Sanitation in 00-7593, Appellee Bristol Trash Removal in 00-7593, Appellee Levitt's Commercial in 00-7593, Appellee Ingersoll Pickup Inc. in 00-7593 supplemental brief filed with proof of service.
01/26/01	Amicus Curiae N.Y.S. Assoc. for So in 00-7593 supplemental brief filed with proof of service.
01/26/01	Appellant Oneida-Herkimer in

Date Filed	Docket Text
	00-7593, Appellant County of Oneida in 00-7593, appellant County of Herkimer in 00-7593 affidavit in support of supplemental brief filed with proof of service.
01/26/01	Appellant Oneida-Herkimer in 00-7593, Appellant County of Oneida in 00-7593, appellant County of Herkimer in 00-7593 joint supplemental brief filed with proof of service.
07/27/01	Judgment of the district court is REVERSED & REMANDED by published signed opinion filed. (TJM)
07/27/01	Judge Calabresi concurring in a separate opinion filed.
07/27/01	Judgment filed.
08/21/01	Judgment MANDATE ISSUED.
11/14/01	Notice of filing petition for writ of certiorari for Appellee United Haulers Assoc. in 00-7593, Appellee Transfer Systems, Inc., in 00-7593, Appellee Bliss Enterprises in 00-7593, Appellee Ken Wittman Sanitation in 00-7593, Appellee Bristol Trash Removal in 00-7593, Appellee Levitt's Commercial in 00-7593,

Date Filed	Docket Text
	Appellee Ingersoll Pickup Inc., in 00-7593 dated 11/9/01 filed. Supreme Ct. No. 01-686.
01/11/02	Letter dated 1/7/02 from the Supreme Court advising of order DENYING petition for writ of certiorari [1965748-1] by Appellee United Haulers Assoc., Transfer Systems, Inc., Bliss Enterprises, Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial, Ingersoll Pickup Inc., endorsed on motion dated 11/14/01. FILED. (Supreme Court No. 01-686)

U.S. COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 05-2024-cv

United Haulers Ass'n., Inc., et al.,
Plaintiffs-Appellants,
v.
Oneida-Herkimer Solid Waste Management Authority, et al.,
Defendants-Appellees.

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
04/25/05	Copy of notice of appeal and district court docket entries on behalf of APPELLANT Bliss Enterprises, Inc., Bristol Trash Removal, Ingersoll Pickup, Inc., Ken Wittman Sanitation, et al., filed.
8/29/05	APPELLEES County of Herkimer, New York, County of Oneida, Oneida-Herkimer Solid Waste Management Authority, joint brief filed with proof of service.
09/08/05	AMICUS CURIAE Attorney General for the State of New York, brief filed with proof of service.
09/13/05	AMICUS CURIAE Bristol Resource Recovery Facility Operating Committee, brief filed with proof of service.
09/22/05	Amicus Curiae Attorney General

Date Filed	Docket Text
	for the State of New York motion allow oral argument filed with proof of service.
10/03/05	APPELLANT Bliss Enterprises, Inc., Bristol Trans Removal, Ingersoll Pickup, Inc., Ken Wittman, Sanitation, et al., reply brief filed with proof of service.
10/26/05	Set for argument on 12/14/05.
11/16/05	Order FILED GRANTING motion to participate in oral argument, 10 minutes to be divided between appellee and State amicus; as amicus by amicus Curiae Attorney General for the State of New York, Appellant United Haulers Association, Inc., Appellant Transfer Systems, Inc., Appellant Bliss Enterprises, Inc., Appellant Ken Wittman Sanitation, Appellant Bristol Trash Removal, Appellant Levitt's Commercial Containers, Inc., Appellant Ingersoll Pickup, Inc., endorsed on motion dated 9/22/05 (for the Court-AV).
12/14/05	Case heard before CALABRESI, KATZMANN, WESLEY, C.JJ
02/16/06	Judgment of the district court is Affirmed by published signed opinion filed.

Date Filed	Docket Text
02/16/06	Judgment filed.
03/14/06	Judgment MANDATE ISSUED. CLOSED.
05/01/06	Notice of filing petition for APPELLANT Bliss Enterprises, Inc., Bristol Trash Removal, Ingersoll Pickup, Inc., Ken Wittman Sanitation, et al., dated 4/24/06 filed. Supreme Court No. 05-1345.
10/05/06	Letter dated 9/26/06 from the Supreme Court advising of order GRANTED petition for writ of certiorari by APPELLANT Bliss Enterprises, Inc., Bristol Trans Removal, Ingersoll Pickup, Inc., Ken Wittman Sanitation, et al., filed. (Supreme Court No. 05-1345)
10/05/06	Writ of Certiorari GRANTED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED HAULERS ASSOC., INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC. and INGERSOLL PICKUP, INC.,

Plaintiffs,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA and COUNTY OF HERKIMER,

Defendants.

Case Number: 95-CV-0516

COMPLAINT

The Plaintiffs, by and through their attorneys, Young Stockli & Rowe, as and for their complaint against the Defendants, allege as follows:

PRELIMINARY STATEMENT

1. This is an action pursuant to 42 U.S.C. §1983, the Declaratory Judgment Act, 28 U.S.C. §2201, *et seq.*, and the Commerce Clause of the United States Constitution seeking a determination that Oneida County Local Law No. 1 of 1990 and Herkimer County Local Law No. 1 of 1990 (hereinafter collectively referred to as "Flow Control Laws"), facially and as applied, unconstitutionally discriminate and/or unduly burden interstate commerce in violation of Article I, section 8, clause 3 of the Commerce Clause of the United States Constitution by requiring that solid waste generated, originated or brought within Oneida and Herkimer Counties

(hereinafter collectively referred to as "Counties") be transferred to and/or disposed at facilities designated by the respective County or the Oneida-Herkimer Solid Waste Management Authority pursuant to contract with the Counties, and that said discrimination constitutes a deprivation under color of law and regulation of the Plaintiffs' rights, privileges and immunities secured by the United States Constitution in violation of 42 U.S.C. §1983. Plaintiffs seek an injunction barring enforcement of the Flow Control Laws, and the contracts, regulations and resolutions entered into, enacted and/or adopted in accordance therewith, and further seek damages for the deprivation of Plaintiffs' constitutional rights and attorneys' fees in accordance with 42 U.S.C. §1988.

JURISDICTION

2. This Court has jurisdiction over this case pursuant to 28 U.S.C. §§1331 and 1343(a)(3) because this case requires resolution of a federal question under the Commerce Clause of the United States Constitution and is brought pursuant to 42 U.S.C. §1983.

VENUE

3. This case is properly venued in the Northern District of New York pursuant to 28 U.S.C. §§1391(b) and (c) because the Plaintiffs' causes of action arose in this District and all parties are located within this District.

PARTIES

4. The Plaintiff United Haulers Assoc., Inc. (the "Association") was and is a not-for-profit New York corporation doing business in the State of New York with its principal place of business located at P.O. Box 283, Westmoreland, New York. At all times relevant to the allegations of this complaint, the Association was and is a not-for-profit corporation comprised of solid waste management companies engaged in the collection, transport,

processing and/or disposal of solid waste generated, originated or brought within the Counties of Oneida and Herkimer.

5. The Plaintiff Transfer Systems, Inc. ("TSI") was and is a New York corporation doing business in the State of New York with its principal place of business located at R.D. 2 Dyke Road in Frankfort, New York. At all times relevant to the allegations of this complaint, TSI was and is a corporation engaged in the collection, transport, processing and disposal of solid waste generated, originated or brought within the Counties of Oneida and Herkimer.

6. The Plaintiff Bliss Enterprises, Inc. ("Bliss") was and is a New York corporation doing business in the State of New York with its principal place of business located at R.D. 2 Hillsboro Road in Camden, New York. At all times relevant to the allegations of this complaint, Bliss was and is a corporation engaged in the collection, transport, processing and disposal of solid waste generated, originated or brought within the Counties of Oneida and Herkimer.

7. The Plaintiff Ken Wittman Sanitation ("Wittman") was and is a sole proprietorship doing business in the State of New York with its principal place of business located at 19 Tibbitts Road in New Hartford, New York. At all times relevant to the allegations of this complaint, Wittman was and is a business engaged in the collection, transport, processing and disposal of solid waste generated, originated or brought within the Counties of Oneida and Herkimer.

8. The Plaintiff Bristol Trash Removal ("Bristol") was and is a sole proprietorship doing business in the State of New York with its principal place of business located at Gore Road in Rome, New York. At all times relevant to the allegations of this complaint, Bristol was and is a business engaged in the collection, transport, processing and disposal of solid waste generated, originated or brought within the Counties of Oneida and Herkimer.

9. The Plaintiff Levitt's Commercial Containers, Inc. ("Levitt's") was and is a New York corporation doing business in the State of New York with its principal place of business located at 867 Route 5 in Utica, New York. At all times relevant to the allegations of this complaint, Levitt's was and is a corporation engaged in the collection, transport, processing and disposal of solid waste generated, originated or brought within the Counties of Oneida and Herkimer.

10. The Plaintiff Ingersoll Pickup, Inc. ("Ingersoll") was and is a New York corporation doing business in the State of New York with its principal place of business located at Box 145A, Military Road in Poland, New York. At all times relevant to the allegations of this complaint, Ingersoll was and is a corporation engaged in the collection, transport, processing and disposal of solid waste generated, originated or brought within the Counties of Oneida and Herkimer.

11. At all times relevant hereto, the Defendant Oneida County was and is a municipal corporation of the State of New York, constituting a political subdivision thereof, created and existing under the laws of the State of New York with offices at 800 Park Avenue in Utica, New York.

12. At all times relevant hereto, the Defendant Herkimer County was and is a municipal corporation of the State of New York, constituting a political subdivision thereof, created and existing under the laws of the State of New York with offices at P.O. Box 471, County Office Building in Herkimer, New York.

13. At all times relevant hereto, the Defendant Oneida-Herkimer Solid Waste Management Authority was and is a public benefit corporation and a body corporate and politic, created and existing under the laws of the State of New York, with offices located at 311 Turner Street, Suite 401, in Utica, New York.

GENERAL ALLEGATIONS

14. The Oneida-Herkimer Solid Waste Management Authority Act (hereinafter the "Act") was enacted by the New York State Legislature in 1988, with an effective date of September 1, 1988.

15. Pursuant to the Act, a public benefit corporation known as the Oneida-Herkimer Solid Waste Management Authority (hereinafter the "Authority") was created with the powers and duties set forth in Title 13-FF of the New York State Public Authorities Law ("PAL").

16. The Act grants the Authority the power to, among other things, collect, receive, transport, process, dispose of and deal with solid waste and any byproducts thereof generated in the Counties.

17. The Act further grants the Authority the power to contract with the Counties for the development or construction of solid waste management-resource recovery facilities, as defined in PAL §2049-bb(16), and grants the Authority the power to contract with the Counties so as to provide sufficient revenues to pay the principal and interest on the bonds of the Authority as the same shall become due.

18. The Act at PAL §2049-ee(8) states that the Authority has the power to contract with the Counties for the delivery of all solid waste generated within the Counties to a specific solid waste management-resource recovery facility, and prohibits the Authority from receiving, collecting, treating or disposing of solid waste (other than recyclables) generated outside the Counties.

19. The Act at PAL §2049-tt(2) states that the Counties may enter into contracts with the Authority which require the Counties to deliver or cause to be delivered all of the solid waste generated, originated or brought within the Counties to facilities designated by the Authority.

20. The Act at PAL §2049-tt(3) states that the Counties, as instrumentalities of the State, may adopt "local laws, ordinances and regulations imposing appropriate and reasonable limitations on competition with respect to collecting, receiving, transporting, delivering, storing, processing and disposing of solid waste," including local laws which require that all solid waste generated, originated or brought within the boundaries of the Counties be brought to solid waste management-resource recovery facilities owned and/or operated by the Authority.

21. The Act provides that any such local law adopted by the Counties, or one of them, may contain enforcement and penalty provisions providing for the imposition of civil penalties, fines, monetary charges or the suspension or revocation of permits or licenses granted by any jurisdiction for the collection, receiving, transporting, delivery or storing of solid waste.

22. The Act states that the Counties may contract with the Authority so as to obligate the Counties to pay such amounts as shall be necessary to assure the continued operation and solvency of the Authority.

23. Allegedly pursuant to the Act, on or about May 10, 1989, the Authority entered into a Solid Waste Management Agreement ("May 1989 Agreement") with the Counties, wherein the Authority agreed to, among other things, operate certain existing solid waste management facilities, to study the solid waste and recycling needs of the Counties' residents and to manage and dispose of all solid waste, including recyclables, generated, originated or brought within the Counties.

24. In the May 1989 Agreement, the Authority agreed to take over the operation of the Oneida County Energy Recovery Facility ("ERF") in Rome, New York commencing on January 1, 1990, and to charge a tipping and/or disposal fee sufficiently high to cover (among other things) the costs

of outstanding capital and interest expenses and principal and other debt and operating and maintenance expenses.

25. In the May 1989 Agreement, the Authority further agreed to supervise and administer the planning, design, equipping and operation of a Materials Recovery Facility, also known as the Oneida-Herkimer Recycling Center, in Utica, New York ("Recycling Center") and to either purchase or operate said facility in the future, paying the operating and maintenance costs associated with said facility.

26. In the May 1989 Agreement, the Counties agreed to direct all recyclables collected from residences in the Counties to the Recycling Center upon its completion, or to another Authority-designated facility.

27. In the May 1989 Agreement, the Counties conveyed to the Authority all rights to solid waste generated, originated or brought within the Counties and, in doing so, relied on PAL §2049-tt as the enabling legislation for such an agreement.

28. In the May 1989 Agreement, the Counties also delegated to the Authority the right to select the sites for solid waste management facilities to handle waste generated, originated or brought within the Counties.

29. In the May 1989 Agreement, the County agreed to deliver or cause to be delivered all solid waste originated or brought within the Counties to solid waste management facilities designated, owned and/or operated by the Authority.

30. In the May 1989 Agreement, the Authority agreed to assume regulatory powers (including permitting and enforcement authority) with regard to private haulers operating within the Counties and was granted the power to establish tipping fees and user fees to finance the operation, maintenance and costs of the ERF, the Recycling Center and any additional facilities built by or for the Authority.

31. Allegedly pursuant to the Act, in or about December of 1989, the Oneida County Board of Legislators enacted Oneida County Local Law No. 1 of 1990 ("Oneida Law") which requires that all solid waste and recyclables generated within Oneida County be hauled and/or delivered by a hauler permitted by Oneida County or the Authority to a facility designated by Oneida County or by the Authority pursuant to contract with Oneida County.

32. The Oneida Law requires the removal of solid waste and recyclables from the property on which they are generated to be performed by the municipality, a licensed private hauler or the individual generator and requires that such solid waste and/or recyclables be delivered to a facility designated by Oneida County or the Authority pursuant to contract with Oneida County.

33. Pursuant to the Oneida Law, tipping fees and other charges for the handling and disposal of solid waste are established by the Oneida County Board of Legislators upon its own initiative, upon the recommendation of the Oneida County executive or by the Authority pursuant to contract with Oneida County.

34. The Oneida Law requires that any person commercially collecting, picking up or removing solid waste and/or recyclables generated in Oneida County obtain a permit from Oneida County or from the Authority pursuant to contract with Oneida County.

35. A failure to comply with the Oneida Law, including the failure to deliver solid waste to an Authority-designated facility, subjects the violator to civil penalties, fines, imprisonment and/or the loss of the violator's solid waste collection and disposal permit.

36. Allegedly pursuant to the Act, in or about February of 1990, the Herkimer County Legislature ("Legislature") enacted Herkimer County Local Law No. 1 of 1990

("Herkimer Law"), which requires that all solid waste and recyclable material generated within Herkimer County be hauled and/or delivered by a hauler permitted by Herkimer County or the Authority to a facility designated by the Legislature or by the Authority pursuant to a contract with Herkimer County.

37. The Herkimer Law requires that all persons or companies engaged in the commercial collection, pick-up, transfer, removal and/or disposal of solid waste and/or recyclables obtain a permit issued by Herkimer County or by the Authority pursuant to contract with Herkimer County.

38. The Herkimer Law prohibits the placement of solid waste and/or recyclables at property within Herkimer County for collection unless that property generated said material.

39. The Herkimer Law requires the removal of garbage and recyclables (as defined therein) from the property on which they are generated to be performed by the municipality, a licensed private hauler or the individual generator and the delivery of such material at a disposal location approved by Herkimer County or the Authority pursuant to contract with Herkimer County. Tipping fees and other charges for the handling and disposal of recyclables are established by the Legislature or by the Authority pursuant to contract with Herkimer County.

40. The Herkimer Law requires the disposal of residential, commercial and industrial construction and demolition ("C&D") debris at the "Demolition Debris Disposal Site" or at another "suitable site as designated by the Legislature." Tipping fees and other charges for the handling and disposal of this material are established by the Legislature or by the Authority pursuant to contract with Herkimer County.

41. The Herkimer Law requires that yard waste be composted by Herkimer County at sites designated by the

Legislature or by the Authority pursuant to contract with Herkimer County, but does not prohibit private composting of yard waste. Tipping fees and other charges for the handling and disposal of residential yard waste are established by the Legislature.

42. The Herkimer Law requires that commercial and industrial waste, major appliances, large household furnishings, vehicular tires, household hazardous waste and infectious waste collected by private haulers be delivered to a facility or site designated or approved by the Legislature or by the Authority pursuant to contract with Herkimer County. Tipping fees and other charges for the handling and disposal of this material, with the exception of infectious waste, are established by the Legislature or by the Authority pursuant to contract with Herkimer County.

43. A failure to comply with the Herkimer Law (including the failure to deliver solid waste to an Authority-designated facility) subjects the violator to civil penalties, fines, imprisonment, revocation of the violator's solid waste collection and disposal permit and/or revocation of all rights and privileges to collect, pick up, transfer, remove or dispose of solid waste or recyclables as defined therein.

44. On or about December 28, 1989, the Authority and the Counties entered into a second Solid Waste Management Agreement (hereinafter "December 1989 Agreement").

45. Pursuant to the December 1989 Agreement, the Authority agreed to manage the solid waste generated, originated or brought within the Counties by receiving, treating and disposing of such solid waste, including recyclables, at Authority-designated facilities.

46. Pursuant to the December 1989 Agreement, the Authority agreed to issue, sell and deliver bonds to finance its management of solid waste generated, originated or brought within the Counties in reliance upon the Counties'

agreement to pay the Authority's operating costs and debt service less the amount of monies received by the Authority from tipping fees or other funds levied or raised for the receipt, processing and disposal of solid waste, including recyclables.

47. Pursuant to the May and December 1989 Agreements, the Authority has been delegated the power and responsibility for enforcing the Flow Control Laws, which such power includes the power to revoke the licenses of private haulers refusing to comply with the Flow Control Laws and the power to designate the facilities to which solid waste and/or recyclables originated, generated or brought within the Counties must be delivered for processing and/or disposal.

48. The Authority has adopted and enforced policies, resolutions and/or regulations which require the Plaintiffs and other private haulers to transport and/or dispose of all solid waste and recyclables that originated, are generated and/or are brought within the Counties at facilities owned and/or operated by the Authority and located within the Counties.

49. The Authority administers, issues and enforces the solid waste collection and disposal permit system for the public and private collectors of solid waste and recyclables generated in the Counties.

50. In March of 1990, the Authority issued $42.8 million in variable rate revenue bonds and utilized these funds to, among other things, purchase the ERF, the Ash Landfill on Tannery Road in Rome, New York ("Ash Landfill") and the Recycling Center, to complete construction of the Recycling Center, to construct the Green Waste Compost Facility in Utica, New York ("Compost Facility") and to reimburse the Counties for monies spent on planning and construction costs.

51. In 1991, the Authority issued $8.1 million in Solid Waste System Revenue Bonds to, among other things, finance the acquisition and construction of a transfer station in Utica, New York (the "Transfer Station").

52. In 1992, the Authority issued $50,510,000 in Solid Waste System Revenue Bonds to, among other things, finance the redemption of the 1990 and 1991 bonds.

53. The Authority currently owns and operates the ERF, the Ash Landfill, the Recycling Center, and the Compost Facility.

54. The Authority also owns the Transfer Station which is operated by Empire Sanitary Landfill, Inc. pursuant to contract with the Authority.

55. The Authority is currently vested with all solid waste management responsibilities for the Counties and has designated the above-referenced facilities for the receipt, treatment and/or disposal of solid waste and/or recyclables generated, originated and/or brought within the Counties.

56. The Ash Landfill and the Transfer Station accept solid waste and C&D debris. Pursuant to the Flow Control Laws, the May 1989 Agreement, the December 1989 Agreement and, upon information and belief, pursuant to the policies, regulations and/or resolutions enacted and/or adopted by the Authority, except as provided below in paragraphs 57 through 64, all solid waste originated, generated or brought within the Counties must be delivered to and/or disposed at the Ash Landfill, the ERF, the Transfer Station, the Green Waste Compost Facility or the Recycling Center as designated by the Authority.

57. Upon information and belief, the Compost Facility accepts only green waste (as defined in the Flow Control Laws). Pursuant to the Flow Control Laws, the May 1989 Agreement, the December 1989 Agreement and, upon information and belief, pursuant to the policies, regulations

and/or resolutions enacted and/or adopted by the Authority, all green or yard waste generated in the Counties, which is not privately composted, must be delivered to the Authority's Compost Facility.

58. Upon information and belief, the Recycling Center began operating in February of 1991 and primarily processes mixed household recyclables. The Recycling Center also accepts recyclables from commercial, industrial and institutional establishments in the Counties. Pursuant to the Flow Control Laws, the May 1989 Agreement, the December 1989 Agreement and, upon information and belief, pursuant to the policies, regulations and/or resolutions enacted and/or adopted by the Authority, all recyclables generated in the Counties must be delivered to the Recycling Center for processing. The Authority sells the recyclables it receives from Plaintiffs.

59. Upon information and belief, the ERF was constructed in 1985 by Oneida County to incinerate municipal solid waste for western Oneida County and to sell energy in the form of steam to Griffiss Air Force Base ("GAFB").

60. Upon information and belief, GAFB decided to no longer purchase steam produced by the ERF and the Authority determined that, as a result, operation of the ERF would no longer be cost-effective. Accordingly, the Authority has discontinued operation of the ERF as an incinerator but, upon information and belief, still operates the ERF as a transfer station.

61. Pursuant to Authority resolution, C&D debris can be disposed at and/or delivered to the Ash Landfill or the Transfer Station and can also be delivered to other facilities within the Counties for the term of any contracts between Plaintiffs and said facilities which were in existence and legally binding as of February 15, 1993.

62. Pursuant to Authority resolution, C&D debris can also be delivered to other permitted facilities in the Counties for processing, recycling and recovery only, provided that the C&D waste from such facilities is subsequently delivered to the Authority's Transfer Station for delivery to the Empire Landfill.

63. In or about June of 1991, the Authority awarded a five-year contract to Empire Sanitary Landfill in Taylor, Pennsylvania ("Empire Landfill") for the disposal of non-recyclable waste generated or originated in the Counties. This agreement obligates the Authority to deliver or cause to be delivered solid waste generated or originated in the Counties to a Transfer Station owned by the Authority and operated by Empire Sanitary Landfill, Inc. ("Empire") in Utica, New York, for subsequent disposal at the Empire Landfill.

64. In 1994, the Authority amended its agreement with Empire so as to extend its term through 1998. The contract between the Authority and Empire provides for a tipping fee of $56 per ton for the period 1995 through 1998. This disposal rate is charged to the Authority by Empire for solid waste delivered to the Transfer Station for disposal.

65. The Authority has not yet sited a new County landfill but has chosen candidate sites in the Counties. The Authority's current use of an out-of-State landfill for the ultimate disposal of solid waste generated in the Counties is anticipated by the Authority as only temporary and the Authority intends to eventually dispose of, and require the disposal of, all waste originated, generated or brought within the Counties at a landfill owned and/or operated by the Authority in the Counties.

66. Development costs for the Authority's new landfill have been estimated by the Authority at $34-41 million, with a resulting disposal cost of approximately $53 to $74 per ton, plus additional service costs of approximately $25 per ton.

67. Upon information and belief, the Flow Control Laws, the May 1989 Agreement, the December 1989 Agreement and the policies, rules, regulations and/or resolutions promulgated in accordance therewith were enacted, adopted and/or entered into in order to finance the Authority's purchase of certain solid waste management facilities from the Counties, to reimburse the Counties for planning and construction costs associated with solid waste management facilities, to finance the acquisition and construction of the Transfer Station and the Compost Facility, and to finance a new County landfill to handle solid waste generated, originated or brought within the Counties.

68. Pursuant to the Flow Control Laws, the May 1989 Agreement, the December 1989 Agreement and, upon information and belief, pursuant to the policies, rules, regulations and/or resolutions enacted and/or adopted by the Authority, except as provided in paragraphs 61 and 62 for C&D debris and paragraph 57 for green waste, the following facilities are the only facilities to which Plaintiffs and other private haulers can transport and/or dispose of solid waste and/or recyclables generated, originated or brought within the Counties: (1) the Transfer Station in Utica, New York; (2) the Ash Landfill in Rome, New York; (3) the Recycling Center in Utica, New York; (4) the Green Waste Compost Facility in Utica, New York; and (5) the ERF in Rome, New York.

69. Pursuant to the Authority's 1995 Rules and Regulations, all haulers, including Plaintiffs, must obtain a Solid Waste Collection and Disposal Permit from the Authority pursuant to the Flow Control Laws and must pay the Authority the following tipping fees for 1995:

(a) Solid Waste Disposal: $86 per ton of solid waste unless witnessed disposal is required or the solid waste load contains greater than 25% recyclables, in which case the charge is $172 per ton.

(b) C&D Debris Disposal: $67 per ton at the Transfer Station; $40 per ton at the Ash Landfill; $86 per ton if mixed with solid waste; and $172 per ton if mixed with greater than 25% recyclables.

70. But for the Flow Control Laws, the May 1989 Agreement, the December 1989 Agreement and the contracts, rules, regulations and resolutions adopted or enacted in accordance therewith, the Plaintiffs could deliver and dispose of solid waste generated, originated or brought within the Counties at other facilities, including out-of-State facilities, for substantially less cost per ton of solid waste.

71. In May of 1994, the United States Supreme Court in *C&A Carbone, Inc. v. Town of Clarkstown*, 114 S.Ct. 1677 (1994), held that an ordinance requiring the delivery of all non-hazardous solid waste within or generated within the town to a transfer station located within the town violated the Commerce Clause of the United States Constitution, despite the argument that the flow control ordinance served a legitimate local purpose in ensuring the safe handling and proper treatment of solid waste.

72. Despite the decision in *Carbone*, the Defendants have indicated to Plaintiffs their intent to enforce and have enforced the Flow Control Laws and the rules, regulations and/or resolutions enacted and/or adopted in accordance therewith.

FIRST CAUSE OF ACTION

(Commerce Clause Claim - Discrimination Against Interstate Commerce)

73. Plaintiffs reallege and incorporate by reference the allegations set forth in paragraphs 1 through 72 herein as if fully set forth herein.

74. The Flow Control Laws, in conjunction with the May 1989 Agreement, the December 1989 Agreement and the

policies, rules, regulations and resolutions adopted or promulgated by the Authority in accordance therewith, prohibit the Plaintiffs from collecting solid waste that originated, was generated or was brought within the Counties and delivering or disposing of such waste at any location other than at a facility located in the Counties and designated by the Authority.

75. The Authority-designated facilities are solely located within Oneida County, thereby precluding Plaintiffs from delivering or disposing of waste that originated, was generated or was brought within the Counties at other facilities, including out-of-State facilities.

76. The Authority-designated facilities are owned by the Authority, or either operated by the Authority or by a vendor selected by the Authority, thereby precluding other facilities or operations — including out-of-State facilities — from competing for Plaintiffs' business.

77. The Authority-mandated tipping fees exceed the tipping fees charged by other facilities, including out-of-State transfer stations and disposal facilities, which has caused the Plaintiffs to incur excessive handling and disposal fees for waste generated, originated or brought within the Counties.

78. But for the Flow Control Laws, together with the May 1989 Agreement, the December 1989 Agreement and the policies, rules, regulations and/or resolutions enacted and/or adopted in accordance therewith, Plaintiffs could legally deliver solid waste that originated, was generated or was brought within the Counties, and collected by Plaintiffs, to other facilities, including out-of State disposal facilities, at significantly lower cost than what is currently charged at the Authority's facilities designated above.

79. The Plaintiffs currently collect and transport solid waste and recyclables generated, originated or brought within the Counties pursuant to permits issued by the Authority.

80. By prohibiting the flow of solid waste generated, originated or brought within the Counties to other facilities, including out-of-State facilities, the Flow Control Laws, together with the May 1989 Agreement, the December 1989 Agreement and the policies, rules, regulations and/or resolutions enacted and/or adopted in accordance therewith, are unconstitutional, void, discriminatory and constitute an unreasonable interference with and undue burden on interstate commerce, all in violation of Article I, section 8, clause 3, of the United States Constitution which provides, in part, that "Congress shall have the power . . . to regulate commerce . . . among the several States . . . ."

81. The Flow Control Laws, together with the May 1989 Agreement, the December 1989 Agreement and the policies, rules, regulations and/or resolutions enacted and/or adopted in accordance therewith, are unconstitutional because they hinder and obstruct the free flow of solid waste, unreasonably burden and impede the free flow of interstate commerce, discriminate against interstate commerce and constitute an undue burden on interstate commerce, all of which is contrary to Article 1, section 8, clause 3 of the United States Constitution.

82. The Flow Control Laws, together with the May 1989 Agreement, the December 1989 Agreement and the policies, rules, regulations and/or resolutions enacted and/or adopted in accordance therewith, are unconstitutional, void and in direct conflict with Article VI, Clause 2 of the United States Constitution, which provides that "[t]his Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

83. The Flow Control Laws, together with the May 1989 Agreement, the December 1989 Agreement and the policies, rules, regulations and/or resolutions enacted and/or adopted

in accordance therewith, are financing measures for the construction and operation of solid waste management facilities in the Counties.

84. The Plaintiffs, and members of the Plaintiff Association, as licensed waste management companies within the counties of Herkimer and Oneida, must comply with the Flow Control Laws and the rules, regulations and/or resolutions enacted and/or adopted in accordance therewith or face revocation of their license to operate in the Counties in addition to imprisonment, penalties and/or fines.

85. The Flow Control Laws and the rules, regulations and/or resolutions enacted and/or adopted in accordance therewith have been enforced by the Defendants and Defendants continue to threaten enforcement against Plaintiffs.

86. In view of the actual and/or threatened enforcement of the Flow Control Laws, and the rules, regulations and/or resolutions enacted and/or adopted in accordance therewith, and Plaintiffs' contention that the enforcement of the Flow Control Laws, and the rules, regulations and/or resolutions enacted and/or adopted in accordance therewith, is unconstitutional and deprives Plaintiffs of their rights under the Commerce Clause, there is an actual controversy within the jurisdiction of this Court, requiring adjudication of the rights of the parties.

SECOND CAUSE OF ACTION

(Claim for Damages Under 42 U.S.C. §1983)

87. Plaintiffs reallege and incorporate by reference the allegations set forth in paragraphs 1 through 86 as if fully set forth herein.

88. The Civil Rights Act, 42 U.S.C. §1983, provides that "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or

other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

89. The Flow Control Laws and the Act are statutes of the State within the meaning of 42 U.S.C. §1983.

90. Defendants are each a "person" within the meaning of 42 U.S.C. §1983.

91. The policies, rules, regulations and/or resolutions of the Counties and/or the Authority are regulations and/or ordinances of the State within the meaning of 42 U.S.C. §1983 and were enacted, adopted or promulgated under color of the Flow Control Laws and the Act.

92. The May 1989 and December 1989 Agreements establish customs or usages of the State within the meaning of 42 U.S.C. §1983 and were enacted, adopted or promulgated under color of the Flow Control Laws and the Act.

93. Pursuant to 42 U.S.C. §1988(b), in any action or proceeding to enforce 42 U.S.C. §1983, the court may award the prevailing party reasonable attorneys' fees.

94. The requirement imposed by the Flow Control Laws, the May 1989 Agreement, the December 1989 Agreement and the policies, rules, regulations and resolutions enacted and/or adopted by the Authority that Plaintiffs deliver and dispose of all waste generated, originated or brought within the Counties to facilities designated by the Authority deprives Plaintiffs, under color of State law, of rights secured by the Commerce Clause of the United States Constitution.

95. Plaintiffs have suffered and will continue to suffer damages as a result of Defendants' actions under color of State law, including (but not limited to) excessive tipping and

disposal fees and the costs and attorneys' fees incurred in this action.

WHEREFORE, Plaintiffs request judgment in their favor and against Defendants as follows:

1. Granting a preliminary and permanent injunction:

(a) prohibiting the enforcement of the Flow Control Laws, the May 1989 Agreement and the December 1989 Agreement;

(b) prohibiting the enforcement of the policies, rules, regulations and resolutions adopted and/or promulgated by the Authority which mandate delivery and/or disposal of waste originated, generated or brought within the Counties at Authority-designated facilities; and

(c) enjoining Defendants from prohibiting or otherwise interfering with the collection, processing, transfer and/or disposal of waste originated, generated, brought or collected within the Counties to or at processing, transfer and/or disposal facilities other than those designated by the Defendants;

2. Declaring that the Flow Control Laws, the May 1989 Agreement, the December 1989 Agreement and the policies, rules, regulations and resolutions enacted, adopted and/or promulgated in accordance therewith violate the Commerce Clause of the United States Constitution and are unconstitutional and void;

3. Ordering Defendants to pay damages in an amount necessary to compensate Plaintiffs for any economic loss they have suffered, together with interest and costs;

4. Awarding Plaintiffs reasonable attorneys' fees, together with interest and costs;

5. Retaining jurisdiction to supervise the implementation of the Court's order; and

6. Awarding such other relief as the Court deems just and proper.

Dated: April 14, 1995 YOUNG, STOCKLI & ROWE

By: /s/ Kevin M. Young
Kevin M. Young, Esq.
(Bar Roll No. 102859)
Attorneys for Plaintiffs
Executive Woods
Two Palisades Drive
Albany, New York 12205
(518) 438-9907

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

ANSWER

COMES NOW DEFENDANT Oneida-Herkimer Solid Waste Management Authority (hereinafter referred to as "the Authority"), by and through attorneys RAYHILL & RAYHILL, and for an answer to plaintiffs' complaint alleges as follows:

The Authority DENIES each and every allegation not specifically admitted herein.

1. The Authority ADMITS that plaintiffs have named 42 U.S.C. § 1983, 28 U.S.C. § 2201, et seq, and Article I, Section 8, Clause 3 of the United States Constitution as the grounds for this lawsuit, but the Authority DENIES that a claim has been presented under any of plaintiffs' named theories and further DENIES that plaintiff is entitled to any relief requested therein.

2. The Authority DENIES that this court has subject matter jurisdiction.

3. The Authority ADMITS that if this court had subject matter jurisdiction, venue would be proper.

4-10. The Authority is without sufficient information with which to either admit or deny the allegations contained in paragraphs 4 through 10 of plaintiffs' complaint and therefore DENIES the same.

11-13. The Authority ADMITS the allegations contained in paragraphs 11-13 of plaintiffs' complaint.

14 and 15. The Authority ADMITS the allegations of paragraphs 14 and 15 of plaintiffs' complaint.

16. The Authority ADMITS that it was granted certain powers and assigned certain duties by legislation enacted at Chapter 43-A, Title 13-FF of the New York State Public Authorities Law (hereinafter referred to as the "Act"), but refers the court to the legislation for the court's determination of those powers and duties. To the extent plaintiffs' generalizations are at odds with the Act, the allegations of paragraph 16 are DENIED.

17. The Authority ADMITS it was granted certain powers and assigned certain duties in the Act, but refers the court to the Act for the court's determination of those powers and duties. To the extent plaintiffs' characterizations are at odds with the substance of the Act, plaintiffs' allegations of paragraph 17 are DENIED.

18. The Authority ADMITS it was granted certain powers and assigned certain duties in the Act, but refers the court to the Act for the court's determination of those powers and duties. To the extent plaintiffs' characterizations are at odds with the substance of the Act, plaintiffs' allegations of paragraph 18 are DENIED.

The Authority ADMITS the Act at §2049-ee(8) prohibits the Authority from receiving, collecting, treating or disposing of solid waste (other than recyclables) which are generated outside the Authority's area of operation.

19. The Authority ADMITS it was granted certain powers and assigned certain duties in the Act, but refers the court to the Act for the court's determination of those powers and duties. To the extent plaintiffs' characterizations are at odds with the substance of the Act, plaintiffs' allegations of paragraph 19 are DENIED.

20. The Authority ADMITS the allegations contained in paragraph 20 of the Complaint to the extent that the Counties

are authorized to adopt local laws, ordinances and regulations regarding collection and disposal of solid waste with provisions for enforcement and penalties, but refers the Court to the text of the Act for the nature and extent of such authority, and DENIES all other allegations of paragraph 20 of the Complaint contrary thereto.

21. The Authority ADMITS the allegations contained in paragraph 21 of the Complaint to the extent that the Counties are authorized to adopt local laws, ordinances and regulations regarding collection and disposal of solid waste with provisions for enforcement and penalties, but refers the court to the text of the Act for the nature and extent of such authority, and DENIES all other allegations of paragraph 21 of the Complaint contrary thereto.

22. The Authority ADMITS the allegations contained in paragraph 22 of the Complaint to the extent that the Counties may contract with the Authority with regard to the financial affairs of the Authority, but refers the Court to the text of the Act for the extent and purposes of such contracts, and DENIES all other allegations of paragraph 22 of the Complaint contrary thereto.

23-30. The Authority ADMITS it entered into a Solid Waste Management Agreement in May of 1989 (hereinafter referred to as the "May 1989 Agreement") with Oneida and Herkimer Counties with regard to management of solid waste generated within Oneida and Herkimer Counties and refers the court to the Act and the Agreement for the court's determination of the terms found therein. To the extent the plaintiffs' characterizations of the terms of the Act or the May 1989 Agreement differ from the actual terms, the plaintiffs' allegations of paragraphs 23-30 are DENIED.

31-34. The Authority ADMITS the existence of Local Law No. 1 of 1990 enacted by the Oneida County Legislature (hereinafter referred to as "the Oneida Law") and refers the court to such law for the court's interpretation of its terms.

To the extent plaintiffs' characterizations differ from the actual terms of the Oneida Law, the allegations of paragraphs 31-35 of plaintiffs' complaint are DENIED.

35. The Authority DENIES knowledge and information sufficient to admit or deny the allegations contained in paragraph 35 of the Complaint, and therefore DENIES the same.

36-42. The Authority ADMITS the existence of Local Law No. 1 of 1990 enacted by the Herkimer County Legislature (hereinafter referred to as "the Herkimer Law") and refers the court to such law for the court's interpretation of its terms. To the extent plaintiffs' characterizations differ from the actual terms of the Herkimer Law, the allegations of paragraphs 36-43 of plaintiffs' complaint are DENIED.

43. The Authority DENIES knowledge and information sufficient to admit or deny the allegations contained in paragraph 43 of the Complaint, and therefore DENIES the same.

44. The Authority ADMITS the allegations contained in paragraph 44 of plaintiffs' complaint.

45. The Authority ADMITS as much of paragraph 45 of the Complaint as allege that the Counties and the Authority entered into a second Solid Waste Management Agreement on or about December 28, 1989 and refers the Court to said contract for the meaning and effect thereof, and DENIES each and all allegations of said paragraph of the Complaint contrary thereto.

46. The Authority ADMITS as much of paragraph 46 of the Complaint as allege that the Counties and the Authority entered into a second Solid Waste Management Agreement on or about December 28, 1989 and refers the Court to said contract for the meaning and effect thereof, and DENIES each and all allegations of said paragraph of the Complaint contrary thereto.

47. The Authority ADMITS the allegations contained in paragraph 47 of the Complaint to the extent that the Authority has been vested with and/or delegated certain powers under the Local Laws of Oneida and Herkimer Counties, the May and December Agreements, and Title 13FF of the Public Authorities Law. The Court is referred to the text of said laws and Agreements for the substance of the Authority's powers. The Authority DENIES all allegations of paragraph 47 of the Complaint which allege or imply that the Authority has acted in an unlawful or ultra vires manner with respect to its lawfully authorized powers.

48. The Authority DENIES knowledge and information sufficient to admit or deny the allegations contained in paragraph 48 of the Complaint, and therefore DENIES the same.

49. The Authority ADMITS the allegations found in paragraph 49 of plaintiffs' complaint.

50. The Authority ADMITS the allegations contained in paragraph 50 of the Complaint to the extent that the Authority issued bonds in the amounts set forth at the times stated for the purposes set forth in the bond documents. The Court is referred to the bond documents for the specific uses of funds from each bond sale, and the Authority DENIES all allegations of paragraph 50 of the Complaint which are inconsistent with said documents.

51. The Authority ADMITS the allegations contained in paragraph 51 of the Complaint to the extent that the Authority issued bonds in the amounts set forth at the times stated for the purposes set forth in the bond documents. The Court is referred to the bond documents for the specific uses of funds from each bond sale, and the Authority DENIES all allegations of paragraph 51 of the Complaint which are inconsistent with said documents.

52. The Authority ADMITS the allegations contained in paragraph 52 of the Complaint to the extent that the Authority issued bonds in the amounts set forth at the times stated for the purposes set forth in the bond documents. The Court is referred to the bond documents for the specific uses of funds from each bond sale, and the Authority DENIES all allegations of paragraph 52 of the complaint which are inconsistent with said documents.

53. The Authority ADMITS the allegations of paragraph 53 of the complaint to the extent that the Authority owns and operates the compost facility and recycling center, owns the ERF and operates it as a transfer station, and operates the ash landfill.

54. The Authority ADMITS that it owns the transfer station and DENIES the remainder of the allegations of paragraph 54 of plaintiffs' complaint.

55. The Authority DENIES the allegations contained in paragraph 55 of the Complaint, but ADMITS that the Authority is vested with certain lawful authority and has provided certain facilities to the people of Oneida and Herkimer Counties for the disposal of certain materials according to law.

56. The Authority ADMITS the allegations in paragraph 56 of the Complaint to the extent that the Ash Landfill and Transfer Station accept solid waste and C & D debris but otherwise DENIES the allegations of paragraph 56 of the Complaint.

57. The Authority ADMITS the allegation entered in paragraph 57 of the Complaint to the extent that the Compost Facility accepts only green waste but otherwise DENIES the allegations of paragraph 57 of the Complaint.

58. The Authority ADMITS the allegations entered in paragraph 58 of the Complaint to the extent that the Recycling Center began operations in 1991 and accepts

household recyclables and recyclables from other establishments within the Counties; DENIES knowledge and information sufficient to admit or deny the allegations regarding recyclables allegedly received from plaintiffs; and otherwise DENIES all other allegations of paragraph 58 of the Complaint.

59. The Authority ADMITS the allegations in paragraph 59 to the extent the ERF was erected as an ERF in 1965, but the Authority DENIES the remainder of the allegations of paragraph 59.

60. The Authority ADMITS the allegations contained in paragraph 60 of the Complaint to the extent that the ERF is no longer used as an incinerator and is now used as a transfer station, but DENIES all other allegations of paragraph 60 of the Complaint.

61 and 62. The Authority ADMITS the allegations of paragraphs 61 and 62 of plaintiffs' complaint.

63. The Authority ADMITS the allegations contained in paragraph 63 of the Complaint to the extent that a contract between the Authority and Empire Sanitary Landfill of Taylor, PA, was awarded after public bidding in June of 1991, the terms of which speak for themselves, and DENIES all allegations of paragraph 63 of the Complaint contrary thereto.

64. The Authority ADMITS the allegations contained in paragraph 64 of the Complaint, to the extent that a contract amendment with Empire was executed in 1994, the terms of which speak for themselves, and DENIES all allegations of paragraph 64 of the Complaint contrary thereto.

65. The Authority ADMITS it is in the process of siting a landfill within the two-county area for the disposal of Oneida-Herkimer municipal solid waste, but DENIES all other allegations of paragraph 65 of plaintiffs' complaint.

66. The Authority ADMITS the allegations contained in paragraph 66 of the Complaint to the extent that certain cost estimates and projected tipping fees have been estimated based upon a number of assumptions set forth in the planning documents of the Authority, and refers the Court to the official records of the Authority for such estimates and projections, and otherwise DENIES all other allegations of paragraph 66 of the Complaint.

67 and 68. The Authority DENIES the allegations found in paragraphs 67 and 68 of plaintiffs' complaint.

69. The Authority ADMITS that all haulers must obtain a permit prior to collecting solid waste in the two county area.

The Authority ADMITS the plaintiffs have accurately stated the tipping fees, including penalties, for 1995.

The Authority DENIES all remaining allegations of paragraph 69 of plaintiffs' complaint.

70. The Authority DENIES the allegations of paragraph 70.

71. The Authority DENIES the allegations of paragraph 71. The holding of *Carbone v. Town of Clarkstown*, ___ U.S. ___, 114 S.Ct. 1667 (1994) is a matter for the court's construction.

72. The Authority DENIES the allegations of paragraph 72 of plaintiffs' complaint and further DENIES that *Carbone*, *supra*, has any application to the case at bar.

73. The Authority repeats and realleges paragraphs 1 through 72 herein as if fully set forth.

74. The Authority DENIES the allegations of paragraph 74 of plaintiffs' complaint.

75. The Authority DENIES the allegations of paragraph 75 of plaintiffs' complaint.

76. The Authority DENIES that anyone, in-state or out-of-state, is precluded from competing for plaintiffs' business.

77-79. The Authority is without information or belief with which to either admit or deny the allegations of paragraphs 77-79 and therefore DENIES the same.

80-83. The Authority DENIES the allegations of plaintiffs' complaint found in paragraphs 80-83.

84. The Authority is without information as to which regulation plaintiffs contend suffers license revocation for its infraction and therefore the Authority is without information with which to admit or deny the allegations. Accordingly, the allegations of paragraph 84 are DENIED.

85. The Authority DENIES knowledge and information sufficient to admit or deny the allegations contained in paragraph 85 of plaintiffs' complaint, and therefore DENIES the same.

86. The Authority DENIES the allegations of paragraph 86 of plaintiffs' complaint.

87. The Authority repeats and realleges paragraphs 1 through 86 herein as if fully set forth.

88. The Authority asserts that the allegations set out in paragraph 88 of plaintiffs' complaint, insofar as they reference and quote from a statute (42 U.S.C. § 1983) which speaks for itself, do not require admission, denial or other controversion. The Authority DENIES it has violated 42 U.S.C. § 1983 and further DENIES plaintiffs' have stated a cause of action under 42 U.S.C. § 1983.

89. Whether certain referenced matters constitute "statutes" within the meaning of 42 U.S.C. § 1983 is a matter for determination by this court. The Authority DENIES it has violated 42 U.S.C. § 1983.

90. Whether the Authority is a "person" as defined in 42 U.S.C. § 1983 is a matter for determination by this court. The Authority DENIES it has violated 42 U.S.C. § 1983.

91. Whether the policies, rules, regulations, and/or resolutions are "regulations and/or ordinances" within the meaning of 42 U.S.C. § 1983 is a matter for determination by this court. The Authority DENIES it has violated 42 U.S.C. § 1983.

92. The Authority DENIES the allegations of paragraph 92.

93. The Authority ADMITS 42 U.S.C. § 1988(b) authorizes awards of attorney fees in civil rights actions in certain situations. The Authority DENIES it has violated 42 U.S.C. § 1983, et seq. The authority DENIES that plaintiffs are entitled to an award of attorney fees or any other relief.

94 and 95. The Authority DENIES the allegations of paragraphs 94 and 95.

FIRST AFFIRMATIVE DEFENSE

96. In the early 1960s, Congress recognized that garbage was a problem of epic proportion. Congress also recognized that the volume of garbage of all sorts was expanding exponentially. In order to meet perceived present needs, and in an attempt to avert future disaster, Congress enacted the Solid Waste Disposal Act of 1965. Their efforts proved wholly unsatisfactory and, in 1976, Congress enacted the Resource Conservation and Recovery Act (RCRA) (42 U.S.C. Sections 6901 et. seq.). Congress again underestimated the size of the problem and sweeping amendments were implemented in 1984, 1988, and again in 1992.

RCRA establishes federal guidelines for the handling of solid waste. New York State's Solid Waste Management Plan (NYSWMP) was enacted in direct response to

Congress' enactment of RCRA and was an effort by the State Legislature to implement the RCRA mandates. On September 1, 1988, the Oneida-Herkimer Solid Waste Management Authority, a public benefit corporation, was created by the New York State Legislature and directed in its enabling laws to implement state and federal solid waste policy.

The Laws, Rules and Regulations under attack in this lawsuit are authorized and/or mandated under RCRA and the NYSWMP and the New York Environmental Conservation Law (ECL) and are enforced by the Federal Environmental Protection Agency and the New York State Department of Environmental Conservation. The policies and customs under attack in this lawsuit are the policies and customs of the Federal and State governments.

SECOND AFFIRMATIVE DEFENSE

97. The plaintiffs' complaint fails to state a claim upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE

98. The plaintiffs lack standing to assert the claims set forth in the complaint.

FOURTH AFFIRMATIVE DEFENSE

99. The complaint fails to present an actual case or controversy under the Declaratory Judgment Act and Article Three of the United States Constitution.

FIFTH AFFIRMATIVE DEFENSE

100. This court lacks subject matter jurisdiction.

SIXTH AFFIRMATIVE DEFENSE

101. Plaintiffs have failed to exhaust their administrative remedies.

SEVENTH AFFIRMATIVE DEFENSE

102. Plaintiffs have failed to allege connection with interstate commerce or interstate commerce injury sufficient to afford them commerce clause protection.

EIGHTH AFFIRMATIVE DEFENSE

103. All actions of the Authority are implemented under direct authorization of the Legislature of the State of New York and, accordingly, are protected by the 10th Amendment to the Constitution of the United States.

NINTH AFFIRMATIVE DEFENSE

104. The mandated duties of the Authority, to establish and operate a hierarchical solid waste management system, are intended and designed to achieve the important government functions of safe and responsible solid waste deposit and a reduction of the amount which is deposited. The Authority is not concerned with the protection of local markets for local businesses. The authority is not interested in preventing out-of-state competitors from entering the local solid waste collection market. In fact, should an out-of-state hauler seek to collect solid waste in the Oneida-Herkimer county area, all that hauler need do is seek the same permit all haulers must secure, local or otherwise. The Authority is intent on implementing federal and state law to see that the volume of solid waste is reduced, to see that what can be reused is reused, to see that what can be recycled is recycled, and to see that what can be recovered is recovered. The Authority is intent on the inspection of solid waste to see that toxic substances are not commingled with municipal solid waste. The Authority is intent on implementing and operating a comprehensive recycling program which covers substances from motor oil to paints and solvents — traditional toxic pollutants often dumped in or near groundwater sources. The Authority acts in accordance with and in compliance with the

Herkimer Law and the Oneida Law to protect the public health and promote a sound environment.

TENTH AFFIRMATIVE DEFENSE

105. The Authority and the two Counties are market participants in the disposal of solid waste and recyclables.

As a market participant, the Authority is not precluded under the commerce clause from designating where and how their solid waste will be managed. The Authority is not precluded by the commerce clause from ensuring that RCRA is complied with and future CERCLA liability is avoided. Because the Authority is participating in the market for the article of commerce as defined in this matter, the Authority is exempt from commerce clause scrutiny.

ELEVENTH AFFIRMATIVE DEFENSE

106. The Laws, Rules, Regulations, Policies and Practices of the Authority do not facially discriminate against interstate commerce.

TWELFTH AFFIRMATIVE DEFENSE

107. The Laws, Rules, Regulations, Policies and Practices of the Authority do not have a discriminatory effect upon interstate commerce.

THIRTEENTH AFFIRMATIVE DEFENSE

108. The Authority, through practice or policy, does not discriminate against interstate commerce.

Local interests are not protected over out-of-state interests. The Authority's practices and policies are not a form of economic protectionism. They do not benefit in-state collectors by burdening out-of-state collectors. No class of competitors is protected or harmed by Authority practice or policy on the basis of location or any other criteria.

The Authority and its practices and policies are designed and implemented to serve the local, state, and federal interests of reduction of waste volume and responsible and safe handling of municipal solid waste, to protect the public health and promote a sound environment.

FOURTEENTH AFFIRMATIVE DEFENSE

109. Pursuant to state and local laws all municipal solid waste handled and disposed by the Authority is properly within the dominion, control and possession of the general public and their representatives, the defendants.

FIFTEENTH AFFIRMATIVE DEFENSE

110. The plaintiffs are not entitled to relief due to laches.

SIXTEENTH AFFIRMATIVE DEFENSE

111. The claims asserted in the complaint are not ripe for adjudication.

SEVENTEENTH AFFIRMATIVE DEFENSE

112. The plaintiffs have waived their rights, if any, to relief.

EIGHTEENTH AFFIRMATIVE DEFENSE

113. The plaintiffs are estopped from seeking the relief they have requested.

NINETEENTH AFFIRMATIVE DEFENSE

114. The Laws, Rules, Regulations, policies and customs under attack in this lawsuit are designed to achieve the ends of reduction, reuse, recycling, and recovery. They are not designed to impede interstate commerce nor do they impede interstate commerce.

TWENTIETH AFFIRMATIVE DEFENSE

115. Plaintiffs have failed to join necessary and indispensable parties.

TWENTY-FIRST AFFIRMATIVE DEFENSE

116. Within Oneida and Herkimer Counties, the collection of municipal solid waste and recyclables is regulated by Oneida and Herkimer Counties and the Authority, under grant of power by the State of New York.

TWENTY-SECOND AFFIRMATIVE DEFENSE

117. All relevant actions of the Authority were and are local actions unrelated to interstate commerce and insufficient to implicate the Commerce Clause of the United States Constitution.

TWENTY-THIRD AFFIRMATIVE DEFENSE

118. All relevant actions of the Authority were and are authorized and protected by the Guaranty Clause of the United States Constitution.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

119. A Federal Court adjudicating a dormant Commerce Clause case stands vicariously in the shoes of Congress. Therefore, an adjudication by such a Court which invalidates the citizen-chosen method of managing local solid waste would result in a taking of the property of the Authority and its bondholders, without just compensation, and in violation of the Fifth Amendment to the United States Constitution.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

120. All relevant Laws, Rules and Regulations enacted and/or applied by the Authority serve a valuable local purpose which outweighs any incidental burden, if any, on interstate commerce.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

121. All relevant Laws, Rules and Regulations enacted and/or applied by the Authority do not facially discriminate against interstate commerce and serve a valuable local

purpose which could not be served in any other way and therefore any burden, if any, placed upon interstate commerce is justified.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

122. The Laws, Rules and Regulations enacted and/or applied by the Authority which are the subject of this Complaint were authorized by Act of Congress and are not repugnant to the Commerce Clause of the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, defendant demands judgment against plaintiffs dismissing plaintiffs' Complaint, together with costs and disbursements of this action, including attorneys fees, and such other relief as this Court deems just and equitable.

Dated: June 14, 1995

RAYHILL & RAYHILL
By: /s/ Philip A. Rayhill
Philip A. Rayhill, Esquire
Bar Roll No. 103486
Attorneys for Defendant
Oneida-Herkimer Solid Waste
Management Authority
Office & P.O. Address
P.O. Box 156, 5 Paris Road
New Hartford, NY 13413
Telephone: (315) 735-8575

TO: YOUNG, STOCKLI & ROWE
Attorneys for Plaintiffs
Executive Woods
Two Palisades Drive
Albany, New York 12205

WASTE DISPOSAL AGREEMENT

BETWEEN

EMPIRE SANITARY LANDFILL, INC.
U.S. SYSTEMS CORPORATION

AND

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY

Dated as of June 28, 1991

WASTE DISPOSAL AGREEMENT

TABLE OF CONTENTS

		Page
RECITALS		4
ARTICLE I- DEFINITIONS		
Section 1.01	Definitions	5
Section 1.02	Terms Generally	11
Section 1.03	Notices Generally	12
ARTICLE II - CONDITIONS PRECEDENT		
Section 2.01	General	12
Section 2.02	Conditions to Authority Obligations	12
Section 2.03	Conditions to Obligations of Empire and USS	15
Section 2.04	Satisfaction of Conditions Precedent	16
ARTICLE III - DELIVERY AND DISPOSAL OF SOLID WASTE		
Section 3.01	Overall Responsibilities	16
Section 3.02	Commencement Date; Notice of Site; Change; Receiving Time	17
Section 3.03	Weighing of Solid Waste; Weigh Scale Records	18
Section 3.04	Rejection Rights	18
Section 3.05	Unauthorized Rejections	19
Section 3.06	Alternate Disposal Site	19
ARTICLE IV - DISPOSAL FEE		
Section 4.01	Disposal Fee	19
Section 4.02	Adjustment to Disposal Fee for uncontrollable Circumstance	20
ARTICLE V - OPERATION AND MAINTENANCE OF TRANSFER STATION		
Section 5.01	Design and Construction of Transfer Station	21

Section 5.02	Transfer Station Operations	22
Section 5.03	Use of Transfer Station	23
Section 5.04	Maintenance of Transfer Station	24

ARTICLE VI - INDEMNIFICATION

Section 6.01	Indemnification	25

ARTICLE VII - UNCONTROLLABLE CIRCUMSTANCES

Section 7.1	Excuse for Nonperformance	27
Section 702	Mitigation	27
Section 7.03	Notices	27
Section 7.04	Costs Attributable to Uncontrollable Circumstance	27
Section 7.05	Pro Rata Application of Increased Costs	28

ARTICLE VIII - DISPUTE RESOLUTION AND EVENTS OF DEFAULT

Section 8.01	Dispute Resolution	
Section 8.02	Remedies for Breach	
Section 8.03	Events of Default by Empire and USS	
Section 8.04	Events	

ARTICLE IX - TERMINATION AND REMEDIES

Section 9.01	Termination by the Authority	31
Section 9.02	Termination by the Contractor	31
Section 9.03	Remedies of the Authority	32
Section 9.04	Remedies of the Contractor	33
Section 9.05	Manner of Termination Payment	33
Section 9.06	Survival	33

ARTICLE X - MISCELLANEOUS

Section 10.01	Term	
Section 10.02	Representation of the Authority	34
Section 10.03	Representations of USS	34
Section 10.04	Representation of Empire	35
Section 10.05	Insurance	36
Section 10.06	Performance Bond	37

Section 10.07	Compliance with Laws	40
Section 10.08	Assignment	40
Section 10.09	Subcontracts	40
Section 10.10	Notices	40
Section 10.11	Relationship of the Parties	41
Section 10.12	Waiver	42
Section 10.13	Payment Disputes	42
Section 10.14	Article and Section Captions; References	43
Section 10.15	Severability	43
Section 10.16	Amendment	44
Section 10.17	Agreement Governed by State Law	44
Section 10.18	No Other Agreements	44
Section 10.19	Successors and Assigns	44
Section 10.20	Execution of Documents	44

SCHEDULE I

Description of Facility 47

DISPOSAL AGREEMENT

THIS WASTE DISPOSAL AGREEMENT (the "Agreement") made and entered into as of the 28 day of June, 1991, by and between U.S. Systems Corporation, 314 Main Street, Suite 23, Great Barrington, Massachusetts (U.S.S.), Empire Sanitary Landfill, Inc., P. O. Box 22, Taylor, Pennsylvania (Empire), and the Oneida-Herkimer Solid Waste Management Authority, 311 Turner Street, Suite 401, Utica, New York (the "Authority").

RECITALS:

WHEREAS, the Authority is authorized by Section 2049-ee of the Oneida-Herkimer Solid Waste Management Authority Act, N.Y. Pub. Auth. Law, Article VIII, Title thirteen-FF (1987) (the "Act") to collect, receive, extract, transport, dispose of, sell, store, convey, recycle, and deal with, in any lawful manner and way, Solid Waste and any products or by-products thereof, on such terms and in such manner as the Authority may deem proper; and

WHEREAS, Empire is the owner and operator of one or more Solid Waste disposal facilities with present or future capacity to dispose of Authority Waste; and

WHEREAS, the Authority and Empire desire to enter into an agreement whereby the Authority will deliver or cause to be delivered Authority Waste to a transfer station, and Empire will dispose of such Authority Waste at a Solid Waste disposal facility authorized to operate under all applicable federal, State and local laws; and

WHEREAS, the Authority and Empire have entered into a separate agreement (the construction agreement) whereby Empire has agreed to design and manage construction of a Transfer Station where Authority Waste will be delivered for inspection and loading on trucks for transportation to Empire's landfill located in Taylor, Pennsylvania; and

WHEREAS, USS utilizing its knowledge and expertise with respect to regional disposal requirements will consult with Empire during the design phase and act as compliance inspector during construction of the Transfer Station and perform services as waste management inspector of waste to be delivered to the facility; and

WHEREAS, the Authority has agreed to pay Empire for services performed by Empire and USS in accordance with the terms of this Agreement;

NOW, THEREFORE, in consideration of the premises and of the mutual obligations undertaken herein, the Parties hereby agree as follows:

ARTICLE I - DEFINITIONS

Section 1.01 Definitions. For purposes of this Agreement, the following words and phrases shall be given the respective interpretations and meanings set forth below.

"Alternate Disposal Site" means any duly licensed or permitted alternate disposal facility designated by Empire and approved by the Authority pursuant to Section 3.06.

"Authority Hauler(s)" means any Person permitted by the Authority to deliver Authority Waste to the Transfer Station on behalf of the Authority.

"Authority Surcharge" means the amount per Ton, as said amount may from time to time be revised by the Authority, to be invoiced and billed to Authority Haulers(s) for Solid Waste delivered. to the Transfer Station.

"Authority Waste" means Solid Waste generated or originating in the Counties, net of Recyclables, Hazardous Waste, composted Municipal Solid Waste, waste burned in the Authority's Energy Recovery Facility and waste directed into experimental projects which explore new technology for disposal of solid waste.

"Billing Period" means each calendar month in each Billing Year.

"Billing Year" means each twelve month period commencing on January 1, 1992 and ending on the last day of the twelfth full month thereafter; provided, however, that the first Billing Year shall commence on the first day of the first month following the Commencement Date.

"Business Day" means each Monday, Tuesday, Wednesday, Thursday, Friday and Saturday which is not a Legal Holiday.

"Change in Law" means either (a) the enactment, adoption, promulgation, modification or repeal, after the Contract Date, of any federal, State, County or other local law, ordinance, code, rule or regulation or other similar legislation which establishes requirements affecting the removal, transport and disposal of the Authority Waste more burdensome than the most stringent requirements in effect on the Contract Date, or (b) the imposition, after the Contract Date, of any material conditions in the issuance or renewal of any official permit, license or approval necessary for operation of the Transfer Station or the Facility, which reduces the amount of Authority Waste which may be received at the Transfer Station or the Facility, or which prohibits the receipt of any amount of the Authority Waste at the Transfer Station or the Facility, by establishing requirements with respect to the operation or maintenance of the Transfer Station or the Facility, or with respect to the disposal of Authority Waste, which are more burdensome than the most stringent requirements in effect on the Contract Date. In no event shall a change in federal, State or local tax law, other than a law imposing a fee on the importation of waste into a State, be considered a Change In Law.

"Commencement Date" means the date on which the Authority commences, or causes to be commenced, deliveries of Authority Waste to the Transfer Station, and

Empire is obligated to dispose of such waste, which date shall be established pursuant to the provisions of Section 3.02(a).

"Contract Date" means the date of execution of this Agreement.

"Contractor Fault" means the unexcused nonperformance by either U. S. Systems or Empire Sanitary Landfill, Inc. severally or the negligent or willful act or omission of an agent or employee of either of them under this Agreement.

"Cost Substantiation" means, with respect to any Direct Cost, a certificate, accompanied by supporting documentation, signed by an authorized representative of Empire or the Authority, which certificate shall be provided no later than ninety (90) days after the date on which Empire or the Authority paid such amount, stating such Party's reason for incurring such Direct Cost, the amount of such Direct Cost, and the event or Section of this Agreement giving rise to such Party's right to incur and be reimbursed for any such Direct Cost and that such Direct Cost is at a competitive price for the service or materials supplied.

"Counties" means the Counties of Oneida and Herkimer, New York.

"DEC" means the New York State Department of Environmental Conservation and its successor.

"D.E.R." means the Pennsylvania Department of Environmental Resources and its successors.

"Direct Costs" means, in connection with any work performed by or on behalf of Empire or the Authority by its agents or employees, or any cost or expense incurred by either Empire or the Authority, for which such Party is entitled to reimbursement pursuant to the terms of this Agreement, the sum of (i) the costs of payroll consisting of compensation and fringe benefits, including vacation, sick leave, holidays, retirement, Worker's Compensation

Insurance, federal and State unemployment taxes and all medical and insurance benefits, times 1.10, plus (ii) the costs of materials and supplies purchased in connection with any such work, plus (iii) the costs of travel and subsistence incurred by any employee of such Party, plus (iv) the costs of any payments to subcontractors in connection with such work. Verification of any Direct Cost incurred by Empire or the Authority shall be provided, to the extent of Cost Substantiation, within ninety (90) days of the payment of such amount by the Party seeking reimbursement therefor.

"Disposal Fee" means the cost per Ton payable by the Authority to Empire for disposal of Authority Waste loaded on Transfer Trailers at the Transfer Station for delivery to the Facility.

"Disposal Fee Increase Limitation" means, after the Contract Date, a cumulative increase in the Disposal Fee due to Uncontrollable Circumstances in excess of ten dollars ($10.00) per Ton.

"Empire" means Empire Sanitary Landfill, Inc. incorporated under the laws of the State of Pennsylvania and. authorized to do business in the State of Pennsylvania and the State of New York.

"Environmental Conditions" means the discharge, leaching, disposal or release into the environment of any Solid Waste, Hazardous Waste, hazardous or toxic substance, or contaminant.

"Event of Defaults" means any one or more of those events described in Sections 8.03 and 8.04 hereof.

"Facility" means that certain landfill of Empire located in Taylor, Pennsylvania described in Schedule 1 hereto, which is fully authorized to operate under all applicable federal, State and local laws, and which is suitable for utilization by Empire to dispose of Authority Waste.

"Hazardous Waste" means any material, substance or waste which, as of the Contract Date and by reason of its composition or characteristic, is (a) toxic or hazardous as defined in the Solid Waste Disposal Act, 42 U.S.C. Section 6901 et seq., section 6(e) of the Toxic Substances Control Act, 15 U.S.C. Section 2605(e) or the New York Environmental Conservation Law, Section 27-0701-0103, as any such provisions are replaced or amended, and regulations promulgated and finalized thereunder or (b) special nuclear material, source material, or by-product material within the Atomic Energy Act of 1954, as amended. If any governmental agency or unit now or hereafter having appropriate jurisdiction shall determine that materials, substances, or wastes which were not, as of the Contract Date, considered Hazardous Waste, then such substances shall be Hazardous Waste for purposes of this Agreement as of the effective date of any such determination.

"Legal Holiday" means New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and. Christmas Day.

"Party" or "Parties" means Empire, U.S.S. or the Authority, as the context requires.

"Person" means any individual, corporation, partnership, joint venture, association, joint-stock company, trust, unincorporated organization, or government or any agency or political subdivision thereof.

"Receiving Time" means the period of operation of the Transfer Station consisting of _____ hours from _____ until _____ on each Business Day.

"Schedule" means any exhibit or schedule attached. hereto and incorporated in this Agreement, unless otherwise expressly indicated by the terms of this Agreement.

"Section" means a section of this Agreement.

"Solid Waste" has the meaning specified in 6 NYCRR Part 360-1.2(a), as amended or replaced and DNR Regulations. Solid Waste shall also mean residual waste sludge, and construction and demolition waste as defined in DNR Regulations. The Authority shall only include residual waste, sludge and construction and demolition waste as so defined, in the Authority Waste delivered to the Transfer Station upon 180 days prior written notice to Empire.

"Ton" means two thousand (2,000) pounds.

"Transfer Station" means a solid waste transfer facility where Authority Waste will be delivered by Authority haulers to Empire and where Empire will load Authority Waste on transfer trailers for shipment to Empire's facility for disposal.

"Uncontrollable Circumstance" means any act, event or condition, other than a labor strike, that has had, or may reasonably be expected to have, a direct material adverse effect on the rights or the obligations of a Party under this Agreement, or a direct material adverse effect on the operation of the Transfer Station or the Facility, or on the delivery of Authority Waste to the Transfer Station or the Facility, if such act, event or condition is beyond the reasonable control of the Party relying thereon as justification for not performing an obligation or complying with any condition required of such Party under this Agreement. Such acts or events shall include, but shall not be limited to, the following:

(a) an act of God (except normal weather conditions for the geographic area of the Facility), hurricanes, tornados, epidemic, landslide, lightning, earthquake, flood, fire or explosion or similar occurrence; or an act of the public enemy, war, blockade, insurrection, riot, general unrest, or restraint of government and people, civil disturbance or similar occurrence;

(b) the order, or Injunction and/or judgment of any federal, State or local court, administrative agency or governmental body with jurisdiction over the performance of a Party's obligations under this Agreement; excepting decisions interpreting federal, State and local tax laws; provided that such order or judgment shall not be the result of the negligent or willful action or inaction of the Party relying thereon and neither the contesting in good faith of any such order or judgment nor the failure to so contest shall be construed as a willful or negligent action or inaction of such Party; and

(c) a Change in Law including any change in law which permits the State of Pennsylvania to impose import fees on Authority Waste delivered to the Facility.

(d) suspension, termination or interruption of utilities, water and sewer lines and power transmission lines to the Transfer Station or the Facility (for reasons other than Empire's Fault) which are required for and essential to the operation of the Transfer Station or the Facility.

(e) extraordinary increases in the wholesale price of the resin used to fabricate the liner pads installed after January 1, 1993 at the facility.

"USS" means U.S. Systems Corporation, a corporation organized under the laws of the Commonwealth of Massachusetts and authorized to do business in the Commonwealth of Massachusetts and the State of New York.

"Week" means a period commencing Sunday at 12:01. a.m. and ending on midnight of the following Saturday.

Section 1.02 Terms Generally. Whenever the context may require, any pronoun shall include the corresponding masculine, feminine and neuter forms. The words "include", "includes" and "including" shall be deemed to be followed by the phrase "without limitation", except as the context may otherwise require. The words "agree", "agreement",

"approval and consent" shall be deemed to be followed by the phrase "which shall not be unreasonably withheld or unduly delayed" except as the context may otherwise require.

Section 1.03 Notices Generally. Unless specifically provided elsewhere in this Agreement, at least fifteen (15) days prior written notice shall be required to be given by one Party to the other Party of any breach of this Agreement by the other Party hereto or failure to fulfill any requirement of this Agreement by a Party, in order to allow the Party receiving such notice to cure any such breach or to allow such Party time to prepare for, question or contest the fact that any such requirement of this Agreement has not been fulfilled.

ARTICLE II- CONDITIONS PRECEDENT

Section 2.01 General. All, rights, obligations and liabilities of the parties hereunder shall be subject to the satisfaction of each of the respective conditions precedent set forth in Sections 2.02 and 2.03 on or before the Commencement Date.

Section 2.02 Conditions to Authority Oblations.

(a) Empire and USS shall each have delivered to the Authority a certificate of an authorized officer of Empire and USS respectively, dated as of the Contract Date, to the effect that each of the representations of Empire and USS set forth in Sections 10.03 and 10.04 are true and correct as if made on such date and opinions of counsel to Empire and USS, in customary form and acceptable to the Authority to the effect set forth in clauses (a) through (d) of Sections 10.03 and 10.04;

(b) all applicable permits, licenses and authorizations necessary for Empire's disposal of Authority Waste at the Facility shall be in full force and effect;

(c) The Authority shall have received permits from D.E.C. allowing the construction and operation of the Transfer Station;

(d) Empire shall have filed or caused to be filed all necessary tariffs and obtained all applicable permits for transporting Authority waste to the facility;

(e) The Authority and/or municipalities in the Counties shall have procured or otherwise secured the services of Authority Haulers which, in the determination of the Authority, are sufficient to collect, transport and deliver all Authority Waste to the Transfer Station for disposal;

(f) no action, suit, proceeding or official investigation shall have been overtly threatened or publicly announced or commenced by any Person or federal, State or local governmental authority or agency other than the Authority in any federal, State or local court, that seeks to enjoin, assess civil or criminal penalties against, assess civil damages against or obtain any judgment, order or consent decree with respect to the Authority, Empire or USS as a result of Empire's or USS's participation or intended participation in any transaction contemplated by this Agreement; provided, however, that any such action, suit, proceeding or investigation would, if adversely determined, materially affect this Agreement, or the performance by the Parties of their respective obligations hereunder or the transactions contemplated hereby; and provided further, that this paragraph 2.02(f) shall, without limitation, apply to any action, suit, proceeding or official investigation which is criminal in nature or which challenges the validity, binding effect or enforceability of this Agreement; and. provided further that the existence or threat of any action, suit or proceeding initiated by any person not a governmental agency that has been interposed for purposes of delay or hindrance of Authority programs and which is apparently frivolous shall not be an excuse for nonperformance of the

Authority's obligations hereunder. In the event a party, who is the target of any litigation or other proceeding, provides the other parties with an indemnification or other assurance which is satisfactory to them, then the subject litigation or proceeding shall not interfere with the performance of this Agreement.

(g) no change shall have occurred after the Contract Date in any applicable federal, State or local law, or any applicable federal, state or local rule, regulation or ordinance thereunder, or in the interpretation thereof by any applicable regulatory authority, that would make the execution or delivery by the Authority, Empire or USS of this Agreement, or would make compliance by the Authority, Empire or USS with the terms and conditions of this Agreement or the consummation by the Authority, Empire or USS of the transactions contemplated hereby, a violation of such law, rule, regulation or ordinance;

(h) Empire and USS shall each have submitted evidence, dated as of the Commencement Date, that there has been no material adverse change in their financial condition since the Contract Date; and

(i) Empire and USS shall each have delivered to the Authority certificates of insurance with respect to coverages which are satisfactory to the Authority

(j) Empire shall have furnished to the Authority the performance bond required under Section 10.06 and shall have deposited $350,000 in the joint account required under Section 9.03(b).

(k) Empire shall have designated an Alternate Disposal Site approved by the Authority under Section 3.06 and shall have furnished to the Authority (1) a copy of the contract or other documents satisfactory to the Authority incorporating Empire's arrangements for disposal of Authority Waste at the Alternate Disposal Site and (2) evidence satisfactory to the

Authority that all applicable permits, licenses and, authorizations necessary for Empire's disposal of Authority Waste at the Alternate Disposal Site are in full force and effect.

Section 2.03 Conditions to Obligations of Empire and USS.

(a) The Authority shall have delivered to both Empire and USS a certificate of the Authority, dated as of the Contract Date, to the effect that each of the representations of the Authority set forth in Section 10.02 are true and correct as if made on such date and an opinion of counsel to the Authority, in customary form, to the effect set forth in clauses (a) through (d) of Section 10.02;

(b) no action, suit, proceeding or official investigation shall have been overtly threatened or publicly announced or commenced by any Person or federal, state or local governmental authority or agency other than the Authority in any federal, state or local court, that seeks to enjoin, assess civil or criminal penalties against, assess civil damages against or obtain any judgment, order or consent decree with respect to the Authority, Empire or USS as a result of the Authority's participation or intended participation in any transaction contemplated hereby; provided, however, that any such action, suit, proceeding or investigation would, if adversely determined, materially affect this Agreement, or the performance by the Parties of their respective obligations hereunder or the transactions contemplated hereby; and

(c) no change shall have occurred after the Contract Date in any applicable federal, state or local law, or any applicable federal, state or local rule, regulation or ordinance thereunder, or in the interpretation thereof by any applicable regulatory authority that would make the execution or delivery by the Authority, Empire or USS of this Agreement, or would make compliance by the Authority; Empire or USS with the terms and conditions of this Agreement or the

consummation by the Authority, Empire or USS of the transactions contemplated hereby, a violation of such law, rule, regulation or ordinance.

Section 2.04 Satisfaction of Conditions Precedent.

(a) The Parties shall exercise good faith and due diligence in satisfying the Conditions Precedent set forth in this Article II and each Party shall give prompt notice to each of the other Parties when the foregoing conditions precedent to its obligation have been respectively satisfied or waived in writing by the Party whose obligation is conditioned thereon. If all of the said conditions precedent are not so satisfied or are not waived by a Party whose obligation is conditioned thereon on or before the date specified in Section 3-02(a) hereof as the Commencement Date, or such later date as the Authority may elect, then any other Party may, by-notice in writing to each of the other parties, terminate as of the date of the notice this Agreement with the party whose conditions precedent have not been satisfied or waived. No Party shall be relieved of its obligations hereunder by the failure to satisfy any condition precedent to the extent that the satisfaction of such condition is within such Party's control.

(b) Empire, USS and the Authority shall each provide executed acknowledgements to each of the other Parties that the conditions precedent to their respective obligations under this Agreement have been met immediately upon the satisfaction or waiver of such conditions precedent.

ARTICLE III - DELIVERY AND DISPOSAL OF SOLID WASTE

Section 3.01 Overall Responsibilities.

(a) The Authority shall be responsible for and shall deliver, or cause to be delivered, Authority Waste to the Transfer Station. The Parties agree and understand that the inadvertent and/or periodic delivery of non-Authority Waste shall not constitute a breach of this Agreement by the

Authority; provided, however, that the Authority shall use all reasonable efforts to deliver, or cause to be delivered, only Authority Waste to the Transfer Station.

(b) Empire shall accept such waste at the Transfer Station from collection vehicles which will deposit the waste on the tipping floor of the Transfer Station.

(c) The Authority shall collect the disposal fee and Authority surcharge described in Article IV for each load deposited by collection vehicles at the Transfer Station.

(d) USS shall inspect waste to be delivered to the facility and shall identify any waste other then Authority waste which can be rejected under paragraph 3.04.

(e) Empire shall load waste into open top transfer trailers and transport the loaded transfer trailers to the facility.

(f) Empire will unload the transfer trailers at the facility and dispose of Authority waste at the facility.

(g) Empire and USS shall obtain and maintain all necessary licenses and permits In order to enable them to perform their obligations under this Section 3.01 and elsewhere in this Agreement.

Section 3.02 Commencement Date; Notice of Site Chance; Receiving Time.

(a) Provided that the conditions precedent set forth in Article II have been met, the Commencement Date shall be December 1, 1991. If the conditions precedent are not met on or before such date, and the Authority elects to extend the date by which the conditions precedent must be met pursuant to Section 2.04, the Commencement Date shall be the 14th day (unless such 14th day is not a Business Day in which case the applicable day shall be the first Business Day following such 14th day) following the date on which the conditions precedent are met.

(b) Empire shall notify the Authority as soon as possible of its expected use of the Alternate Disposal Site.

(c) Empire shall keep the Facility open for receiving Authority Waste during the Receiving Time, excluding Legal Holidays. Subject to applicable State regulations and any permit issued thereunder, Empire may receive Authority Waste at the Facility at such additional times as Empire and the Authority may agree.

Section 3.03 Weighing of Solid Waste; Weigh Scale Records.

(a) The Authority shall operate N.Y.S. certified weigh scales located in the vicinity of the Transfer Station and maintain the weigh scale records, for the purpose of determining the total Tons of Solid Waste loaded on Transfer trailers leaving the Transfer Station. Empire shall have the right to inspect weigh scale records at any time during normal business hours. At the close of each business day a copy of weigh scale records for the day's activity shall be delivered to Empire by the Authority. Disputes with respect to the occurrence of weigh scale records shall be resolved pursuant to the provisions of Article VIII.

Section 3.04 Rejection Rights at the Transfer Station. USS shall have the right to reject deliveries by or on behalf of the Authority of:

(a) Any material other than Authority Waste;

(b) Authority Waste delivered at other than the Receiving Time;

(c) Authority Waste which cannot be received at the Transfer Station due to an Uncontrollable Circumstance; and

Disputes with respect to whether Authority Waste has been properly rejected shall be resolved pursuant to the provisions of Article VIII.

Section 3.05 Unauthorized Rejections.

(a) If USS rejects Authority Waste delivered to the Transfer Station for any reason other than those set forth in Section 3.04, the Authority shall not be required to pay a Disposal Fee to Empire with respect to such Authority Waste, and USS shall be obligated to pay to the Authority for its Direct Costs incurred, to the extent of Cost Substantiation, for the total of the transportation and disposal charges per Ton incurred by the Authority which are in excess of the Disposal Fee for each such Ton.

Section 3.06 Alternate Disposal Site

Empire shall designate subject to approval by the Authority an Alternate Disposal Site during periods in which Empire is unable to accept Authority waste at the facility. Empire shall enter into such arrangements as may be necessary for disposal by Empire of Authority Waste at such Alternate Disposal Site at no additional cost to the Authority and shall furnish to the Authority copies of the contract or other documents in form and substance satisfactory to the Authority incorporating Empire's arrangements for disposal of Authority Waste at the Alternate Disposal Site. On or before the Commencement Date Empire shall furnish evidence satisfactory to the Authority that all applicable permits, licenses and authorizations necessary for Empire's disposal of Authority Waste at the Alternate Disposal Site are in full force and effect.

ARTICLE IV – DISPOSAL FEE

Section 4.01 Disposal Fee.

(a) Collection. The Authority shall pay the Disposal Fee to Empire by the fifteenth day following the receipt by the Authority of Empire's statement for the Billing Period; provided, however, that if the fifteenth day shall be a Sunday or Legal Holiday, payment shall be made to Empire by the first immediately succeeding Business Day.

Empire shall provide the Authority with a statement together with each request for payment pertinent to such Billing Period. The statement shall set forth the number of Tons of Authority Waste and other Solid Waste loaded on Transfer trailers at the Transfer Station and the Disposal Fee due Empire.

(b) Fee. For any Billing Period, the Disposal Fee to be collected by the Authority from Authority Haulers for the disposal of Authority Waste shall be as follows:

1992	56.55 per ton of Authority Waste loaded on Transfer Trailers
1993	56.55 per ton
1994	56.55 per ton
1995	63.50 per ton
1996	71.31 per ton

(c) The fees listed in Section 4.01(b) are inclusive of all fees for services rendered by Empire and USS under this agreement except that Empire and USS shall agree as to the terms of compensation between them. The Authority shall incur no liability to USS for payment of USS's fees and USS hereby waives any claim against the Authority for any fees for services performed by USS under this contact and agrees that it will look solely to Empire for payment for its services.

Section 4.02 Adjustment to Disposal Fee for Uncontrollable Circumstance.

(a) Subject to Article VII if Empire incurs Direct Costs which are attributable to an Uncontrollable Circumstance, then the Disposal Fee shall be increased by the amount per Ton directly attributable to such Direct Costs, which increase shall be determined in accordance with subsection (b) hereof.

(b) Upon an event described in subsection (a), the increase per Ton in the Disposal Fee shall be determine as follows:

(i) Empire shall deliver to the Authority operating data for the three-year period which precedes the occurrence of the applicable Uncontrollable Circumstance (or if Empire has an operating history of less than three years preceding the Uncontrollable Circumstance, then Empire shall deliver the appropriate data for such lesser period).

(ii) Empire shall deliver to the Authority such data as may be requested by the Authority to enable it to determine the actual cost increase per Ton that would not have been incurred by Empire but for the occurrence of the Uncontrollable Circumstance. No allowance shall be made for profit of Empire.

(iii) The Authority shall determine the increase per Ton on the operating costs of Empire which is attributable to the Direct Costs incurred as a result of the Uncontrollable Circumstance. The amount so determined shall be added to the Disposal Fee.

ARTICLE V - OPERATION AND MAINTENANCE OF TRANSFER STATION

Section 5.01 Design and Construction of Transfer Station

(a) Project Description. Empire shall design and manage construction of a solid waste transfer station abutting the Materials Recovery Facility owned by the Authority. The Transfer Station shall be owned by the Authority and its operation permitted by D.E.C. in the name of the Authority. Empire shall operate the station pursuant to the terms of this contract. Empire's obligations to design and manage construction of the Transfer Station shall be governed by the terms of a separate agreement between Empire and the Authority.

(b) Role of U.S. Systems. U.S. Systems shall consult with Empire concerning compliance of plans and specifications with the terms of the Construction Permit. In no event shall USS be responsible for or obliged to provide supervision of the construction of the transfer station.

5.02 Transfer Station Operations

(a) Weighing of Transfer Trailers. In accordance with Section 3.03 the Authority shall cause each loaded transfer trailer to be weighed on New York State certified scales before departure from the Transfer Station to determine the tonnage of waste to be delivered to the Facility. Scales for weighing the vehicles shall be provided and operated by the Authority at a location to be chosen by the Authority in the vicinity of the Transfer Station.

(b) Discharge and inspection of Waste. After delivery of waste to the Transfer Station U.S. Systems shall inspect and identify Authority Waste to be delivered to the Facility. Unacceptable Waste shall be reloaded on the collection vehicle which deposited such material on the tipping floor.

(c) Loading of Waste. Empire shall collect Authority Waste from the tipping floor of the Transfer Station and load it on walking floor transfer trailers for shipment to the facility. Transfer trailers shall be fully tarped before departure to the facility.

(d) Staging Area. Empire shall have the use of a staging area to allow temporary parking of transfer trailers prior to departure for the facility and after their return.

(e) Transport of Trailers. Empire will transport or cause to be transported all loaded transfer trailers to the facility and empty trailers back to the Transfer Station. Trailers will be dedicated to the performance of Empire's obligations under this contract.

(f) Equipment. The Authority shall procure and maintain at its expense a D-6 Dozer or equivalent, two rubber tire front

end loaders and a knuckle boom crane. This equipment shall be used and operated by Empire in accordance with sound industrial practice at the Transfer Station to process and load Authority Waste on the Transfer trailers. Empire shall perform routine inspections of said equipment in order to advise the Authority of maintenance and repair requirements on a timely basis. Empire shall procure, maintain and operate at its expense the required number of walking floor transfer trailers for transportation of Authority Waste to the Facility.

(g) Staffing of Transfer Station. USS shall staff the transfer station with a qualified waste inspector.

(h) Utilities. Electricity, gas and water used at the transfer station shall be separately metered and billed in the name of the Authority which shall be responsible for the payment of all invoices for these services.

(i) Office. The Authority will at its own cost and expense provide a partitioned area of the transfer station for use by Empire and USS as office space.

Section 5.03 Use of Transfer Station

(a) Empire and USS may use the Transfer Station for the performance of their respective duties under this agreement. If not previously terminated under Article IX, their use of the transfer station shall terminate at the end of the term of this agreement. Thereafter, if continued operation of the Transfer Station by Empire and/or USS is requested by the Authority, the parties shall enter into a new contract that shall incorporate such provisions as may then be required by applicable laws and regulations.

(b) Title to the transfer station shall remain in the Authority. Title to parts replaced by the Empire in carrying out its normal maintenance responsibilities under Section 5.04 shall pass to and vest in the Authority upon completion of their installation in the Transfer Station.

(c) Empire and USS shall keep the Transfer Station free and clear of all liens and encumbrances and, except as otherwise authorized by this contract, shall not remove any part thereof or permit the use by others of any part thereof except as may be permitted by the Authority under Section 10.09 "Subcontracts".

(d) Empire and USS shall not construct or install, any fixed improvement or structural alterations in the Transfer Station without the advance written approval of the Authority. Fixed improvement or structural alterations as used herein means any alteration or improvement in the nature of the building or other real property that, after completion, cannot be removed without substantial loses of value or damage to the premises.

(e) The Authority and any persons designated by it shall, at all times have access to the Transfer Station for the performance of Authority functions on a non-interference basis.

(f) The Authority makes no warranty express or implied regarding the condition or fitness for use or operation of the Transfer Station.

Section 5.04 Maintenance of Transfer Station

(a) Empire shall protect, preserve, and clean the Transfer Station.

(b) As soon as practicable after the completion of the construction of the Transfer Station, Empire shall submit to the Authority in writing a proposed cleaning program. If the Authority agrees to the proposed program it shall become the normal maintenance program of Empire. At the end of the term of this Agreement Empire shall leave the Transfer Station in good order and condition.

(c) The Authority shall be responsible for snow and ice removal, grounds maintenance, mud and dust control and removal of litter outside the Transfer Station.

(d) The Authority shall be responsible for payment of leachate disposal costs.

ARTICLE VI - INDEMNIFICATION

Section 6.01 Indemnification.

(a) Empire agrees that it shall protect, indemnify, and hold harmless the Authority and its respective members, employees and agents, (the "Authority Indemnified Parties") from and against all liabilities, actions, damages, claims, demands, judgments, losses, costs, expenses, suits, or actions and reasonable attorneys' fees, and shall defend the Authority Indemnified Parties in any suit, including appeals, for personal injury to, or death of, any person or persons, or for loss or damage to property arising out of the acts or omissions of Empire in the performance (or nonperformance) of the Empire's obligations under this Agreement. Empire further agrees that the Authority shall not be liable solely as a result of entering into this Agreement or authorizing the disposal of Authority Waste at the Facility or Alternate Disposal Site, for any claims, damages, or loss arising from Environmental Conditions at the Facility or Alternate Disposal Site, and that Empire will indemnify, defend and hold harmless Authority Indemnified Parties against and from all liabilities, obligations, damages, penalties, costs and expenses up to the limits of Empire's pollution liability insurance which shall not be less than $15,000,000.00 of every nature which may be imposed on or incurred by or asserted against them or any of them in connection with the Environmental Conditions existing on or at the Facility or Alternate Disposal Site. Empire is not, however, required to protect indemnify or hold harmless any Authority Indemnified Party for loss or claim resulting from performance (or nonperformance) of the Authority's obligations under this Agreement or the negligence or willful misconduct of any Authority Indemnified Party. Empire's aforesaid indemnity is for the exclusive benefit of Authority

Indemnified Parties and in no event shall such indemnity inure to the benefit of any third Person.

(1) Municipalities. Empire further agrees not to assert any claim damages or seek contribution from any Municipality in the counties arising out of the disposal or arranging for the disposal of Solid Waste at the Facility, or arising from Environmental Conditions at Empire's Facility.

(b) USS agrees that it shall protect, indemnify, and hold harmless the Authority and its respective members, employees and agents (the "Authority Indemnified Parties") from and against all liabilities, actions, damages, claims, demands, judgments, losses, costs, expenses, suits, or actions and reasonable attorneys' fees, and shall defend the Authority Indemnified Parties in any suit, including appeals, for personal injury to, or death of, any person or persons, or for loss or damage to property arising out of the acts or omissions of the USS in the performance (or nonperformance) of the USS obligations under this Agreement. USS is not, however, required to protect, indemnify or hold harmless any Authority Indemnified Party for loss or claim resulting from performance (or nonperformance) of the Authority's obligations under this Agreement or the negligence or willful, misconduct of any Authority Indemnified Party. USS's aforesaid indemnity Is for the exclusive benefit of Authority Indemnified Parties and in no event shall such indemnity Inure to the benefit of any third Person.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

AFFIDAVIT

STATE OF NEW YORK)
ss.:
COUNTY OF ONEIDA)

STEVEN R. KOWALSKY, being duly sworn, deposes and says as follows:

1. I am the President of Empire Recycling Corporation, a private recycling firm that has been in the business of recycling metal and paper in the County of Oneida since 1916. Empire Recycling has been handling the recycling needs of the Counties of Oneida and Herkimer (hereinafter collectively referred to as the "Counties") prior to the creation of the Oneida-Herkimer Solid Waste Management Authority (hereinafter the Authority') and prior to the enactment of flow control laws by the Counties.

2. Empire Recycling maintains two recycling centers. One recycling center is located in Utica, New York, approximately one mile away from the Authority's Recycling Center, and the other recycling center is operated in Syracuse, New York by a division of Empire Recycling, known as S.M.R. Fibre.

3. Because of the enactment and enforcement of flow control in the Counties, Empire Recycling cannot gain access to any recyclables placed at the curbside in the Counties that it had received prior to 1990. As a result, Empire Recycling can only contract for the recyclables of businesses which maintain Empire Recycling containers at their premises for the source separation of recyclables. Empire Recycling cannot participate in the recycling of residential recyclables,

however, because the flow control laws require that curbside recyclables be delivered by haulers — such as the Plaintiffs in this action — to the Authority's Recycling Center. Accordingly, Empire Recycling cannot contract with private haulers for the purchase of curbside recyclables because of flow control.

4. Because the flow control laws apply to recyclables placed at the curb, Empire Recycling could place recycling bins at each individual residence for the collection of recyclables, without violating flow control. This approach to recycling, however, is cost-prohibitive. Individual households do not generate enough recyclable waste to justify individual contracts with those households. On a large scale, however, the residences in the Counties do generate a significant amount of recyclable material. Accordingly, but for flow control, Empire Recycling could contract with private hauling firms (such as the Plaintiffs) for the purchase of recyclables collected at the curbside.

5. The Authority's Recycling Center, which is located one mile down the road from Empire Recycling's facility, does not pay private haulers for recyclable waste collected at the curbside. But for flow control, Empire Recycling would be willing to pay private haulers — such as the Plaintiffs — for recyclables brought to Empire Recycling's facility in Utica. Empire Recycling's standard practice is to send out monthly pricing letters to its customers, which indicate the value of recyclables delivered to Empire Recycling based on market conditions. Empire Recycling enters into month-by-month pricing agreements with private haulers and even has multi-year contracts with other private organizations. When Empire Recycling enters into multi-year contracts with customers, it provides those customers with recycling bins, the contents of which are then graded, packed and sold to brokers or mills, located both in and out of the State of New York.

6. Empire Recycling engages in interstate commerce because it acts as both a processor of recyclable waste and as a broker for mills which convert recyclables into useable product. For example, Empire Recycling either (1) processes recyclables and then sells those recyclables to brokers serving as middlemen for mills or (2) sources recyclable materials for mills which turn the recyclable material into useable product.

7. The brokers and mills that Empire Recycling deals with in these situations are located both in state and out-of-state. Mills will typically buy recyclable product from recycling companies or brokers within a five hundred mile radius, which enables Empire Recycling to deal with mills as far away as Wisconsin, Montreal and South Carolina.

8. Flow control and the Authority's monopoly over curbside recyclables has impacted the recycling business of Empire Recycling. For example, in the 1980s, cardboard and newspaper were a large part of our recyclable business. Since most newspaper and cardboard had to be delivered to the Authority's Recycling Center because of flow control, Empire Recycling — and its out of state customers — were deprived of access to these recyclable products.

9. Empire Recycling and its out-of-state customers have also been impacted by the Authority's ability to charge artificially low prices to its customers as a result of flow control. Flow control causes the flow of all curbside recyclables and non-recyclables to the Authority's facilities. The non-recyclables are accepted only after payment of the $86.00 per ton tipping fee while recyclables are not paid for by the Authority. The Authority's monopoly over non-recyclable waste provides the Authority with the funds to subsidize its Recycling Center, while the monopoly over curbside recyclables gives the Authority free product to sell on the open market. As a result, the Authority can artificially lower the prices it charges for the sale of its recyclables on

the open market to brokers or mills located out-of- state and in Canada. This prevents Empire Recycling and other recycling centers across the northeast (which are not subsidized and must pay for recyclable product before its resale) from competing with the Authority for the business of brokers and milling companies.

10. In support of flow control, the Authority argues that private companies lack the incentive and ability to recycle on a consistent basis because of the fluctuating nature of the recyclables market. The Authority argues that private companies will not have the incentive or desire to collect and haul recyclable material when the recyclables market is low. I have been involved in the business of recycling for the past 20 years. In my experience, it is rare for the recyclables market to crash so dramatically that goods which are profitably recycled one day suddenly become unprofitable recyclables the next day. Moreover, when markets are weak, it is not the fault of the recycler but a function of the economy. Even when the markets are low, however, Empire Recycling continues to recycle material, but there may be times when nominal tipping fees are needed to offset processing costs. Because Empire Recycling pays for most recyclables year round, and only charges for certain recyclables (usually newspaper and cardboard) during limited periods when the markets are low, our customers over the long term still benefit by recycling. They not only avoid paying Authority tipping fees and disposal costs ($86 per ton) which always exceed the costs, if any, charged at our recycling center when the market is low, but they consistently receive payment for their recyclables.

11. While recyclables may fluctuate in value from week-to-week or month-to-month, that market fluctuation is accounted for in the month-to-month pricing agreements or the multi-year contracts executed by Empire Recycling and its customers. Consequently, it is unlikely that the market for

any particular product would crash so drastically that private companies would rescind their contracts or refuse to haul or collect recyclable material.

12. In his affidavit, Hans Arnold — the Authority's Director — argues that flow control was necessary to promote recycling because the private sector was not recycling or educating the public regarding recycling. (Arnold Aff. ¶¶30 and 33.) As part of our longstanding commitment to recycling, Empire Recycling, led by Michael Foye, Vice President of operations, has consistently donated time both before and after 1991 to boy scout groups, girl scout groups, elementary schools and junior high schools to talk about recycling, give tours and augment curriculum pertaining to recycling. Our ongoing advertising campaign includes billboard and newspaper advertising using the slogan "Our work helps the environment work." In fact, during the authority's formation, Michael Foye of Empire Recycling was critical in educating Hans Arnold, Bob Julian, Kevin Manion and other Authority employees and supporters about recycling. Empire Recycling gave tours of its own facility and gave classes on proper grade identification, collection, separation and marketing. It is therefore disingenuous for Mr. Arnold to argue that the private sector did not or does not educate the public about recycling.

13. There was no mandatory recycling in the Counties prior to the enactment and enforcement of flow control. In other words, defendants did not give the private sector the opportunity to operate under mandatory recycling laws; rather, the mandatory recycling laws and the flow control laws were enacted contemporaneously. Had the defendants only enacted mandatory recycling laws, recycling could have been promoted and accomplished by the private sector.

14. Mr. Arnold claims that the recyclable items listed in paragraph 28 of his affidavit were not being recycled by the private sector prior to the opening of the Recycling Center in

1991. (Arnold ¶30.) Attachment A-4 to his own affidavit contradicts this statement. Attachment A-4 is a letter from Empire Recycling advising the City of Utica that, because of low markets, it would be charging $30.00 per ton for newspaper. While this letter indicates that the recycling market was low in June of 1989, it also indicates that our company was indeed recycling newspaper prior to the creation of the Authority or the enactment of flow control. Moreover, the $30 per ton charged by Empire Recycling for newspaper in 1989 was significantly lower than the $88 per ton charged by the Authority the following year for the disposal of waste. Accordingly, even absent flow control, generators would have benefitted by recycling even during periods when the recyclables market was low.

15. Indeed, of the 22 grades listed in paragraph 28 of Mr. Arnold's affidavit, Empire Recycling recycles or has recycled (some materials are no longer received since the County facility opened and began enforcing flow control) newspapers and inserts, magazines and catalogues, phone books, brown grocery bags and kraft paper, junk mail, corrugated cardboard, lightweight cardboard, computer paper, glass, plastics (PET bottles), metal cans (Universal Empire, an Empire Recycling affiliate, accepts all ferrous metals), foil wrap and foil plates and automobile batteries. The only materials not recycled by Empire Recycling include hazardous waste (aerosol cans, motor oil, motor oil filters, household paint, antifreeze), yard waste (yard and garden waste and brush), swimming pool liners, beverage cartons and drink boxes. If given the opportunity, it is likely that Empire Recycling could have begun to recycle hazardous materials. If flow control was not in effect, Empire also could have implemented the new technology that has allowed the recycling of beverage cartons and drink boxes, but flow control prevents Empire Recycling from receiving that tonnage.

16. The Authority focused on newspaper as its first flow control supported recycling effort at its opening in February 1991. As a result, Empire Recycling's newspaper business decreased immediately. As a direct result of the constricting recycling streams, Empire Recycling relocated much of its paper processing operations to Liverpool, New York. The Authority did not begin to focus on corrugated, CPO, office paper, and lower grade mixed paper until after its start-up period. The appreciable decrease in material processed by Empire Recycling did not occur until some months later when the reach of mandated flow control took full effect. The fact remains that much of the paper the Authority claims was saved from being landfilled (Arnold Aff. ¶ 37) was recycled by Empire Recycling long before the opening of the Authority's Recycling Center. The figures in the chart attached as Exhibit A hereto completely contradict Mr. Arnold's claims of a non-existent private recycling market and clearly indicate the negative impact flow control has had on Empire Recycling's business.

17. Moreover, flow control is not necessary to ensure either the collection or the transportation of recyclable material, because these matters are dealt with in the contracts entered into by the municipalities and the private hauling companies. These contracts obligate the private hauling companies to collect and transport recyclables regardless of the value of any particular product in the recyclables market.

18. For example, the City of Utica has a contract with Waste Management, Inc. for the collection of all curbside material. Pursuant to this contract, Utica has given all residential homeowners bins for the collection of waste and recyclables. Waste Management then collects those bins and transports recyclables to the Authority's Recycling Center and non-recyclable waste to the Authority's facilities. Even in the absence of flow control, the City of Utica would still have the right to contract for the collection and transportation

of curbside recyclables and could require the delivery of such waste to facilities of its choosing. But absent flow control, Empire Recycling would have the ability to compete for designation as the chosen recycling facility in such contracts.

19. Because of the nature of Empire Recycling's business, and its business relationship with out-of-state mills and out-of-state brokers, flow control has significantly impacted Empire Recycling's ability to engage in interstate commerce.

20. Based on my 20 years of experience in the recycling business, I do not agree with the Authority's conclusion that flow control promotes recycling. Mandatory recycling laws, with enforcement mechanisms, are responsible for increased recycling rates, not flow control.

21. The only relationship between flow control and recycling is a financial one. In other words, the flow control laws enable the Authority to collect recyclables at no cost for resale on the open market. The tipping fees received on non-recyclables, which are directed to the Authority's facilities by flow control, are used to subsidize the Authority's Recycling Center. These funds received by the Authority can in turn be applied towards the construction and operating costs of the Recycling Center and also allow the Authority to charge artificially low prices for its recyclables on resale in the open market. While funds generated as a result of flow control enable the Authority to publicize recycling on a wider scale than might otherwise be possible, flow control is not the only means of funding public awareness projects.

22. Flow control, in and of itself, does not promote recycling — it simply provides the Counties and the Authority with funds to cover the costs of the Authority's Recycling Center and their public awareness projects. This financial benefit, however, comes at the expense of other recycling centers, such as Empire Recycling, who are

deprived of access to a valuable market and whose ability to sell to out-of-state brokers and mills is lessened due to predatory pricing and diminished access to recyclable material.

/s/ Steven R. Kowalsky
STEVEN R. KOWALSKY
President, Empire Recycling Corporation
North Genesee and Lee Streets
P.O. Box 353
Utica, New York 13503

Sworn to before me this
21 day of July, 1995

/s/ Samuel G. Spado
Notary Public

SAMUEL G. SPADO
Notary Public in the State of New York
Appointed in Oneida County
My Commission Expires April 4, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

AFFIDAVIT

HANS G. ARNOLD, being duly sworn, deposes and says:

1. My name is Hans Arnold and I serve as the Executive Director for the Oneida-Herkimer Solid Waste Management Authority, a position I have held for 14 years.

2. I've worked in the solid waste management profession for over 20 years. I earned a Bachelor of Science degree from the Pennsylvania State University and a master of regional planning from the University of Massachusetts, Amherst. In addition, I was awarded a Winston Churchill Fellowship for the study of solid waste management in Great Britain, Germany and the Netherlands. I am a past president of the New York State Association for Solid Waste Management and an active member. I am also a member of the Solid Waste Association of North America.

3. I was hired in 1978 as a planner for the Herkimer-Oneida Counties Comprehensive Planning Program (HOCCPP) and the Oneida County Environmental Management Council. My first assignments were assisting communities to update their master plans and land use regulations and coordinating environmental programs for the two county region. While working in environmental planning, the director of the HOCCPP and County

Planning Director, Michael Gapin, assigned me to work on solid waste management issues.

ONEIDA & HERKIMER COUNTIES EXPERIENCED SIGNIFICANT WASTE RELATED ENVIRONMENTAL AND PUBLIC HEALTH PROBLEMS

4. In the early 1980's it was apparent that there were significant local and national problems in managing solid waste. Not only was the national news blazing with stories of Love Canal, the Ludlow Landfill and other local hazardous waste sites also were being identified in large numbers. This is described in the 1995 Affidavits in Opposition of Robert F. Julian (Vol. VIII, Exh. 32, ¶¶ 16-24)[1] and Hans G. Arnold (Vol. III Exh. 31, ¶ 12). Many people were genuinely afraid. The region had moved from nearly every municipality having their own landfill (records indicate over 50 in the 1960's) to 20 landfills by the 1970's. None had liners or leachate collection systems and many were in areas that seriously threatened groundwater. As indicated in Michael Gapin's Affidavit in Opposition from 1995(Vol. VIII, Exh. 33) at ¶ 9:

> "In the mid to late 1960's, there was a heightening awareness of environmental impacts that were being caused by operation of the old local dumps. The public was becoming increasingly concerned about drinking water contamination, disease carrying vectors, open burning and the potential for other public health and environmental problems that were associated with historical and, at the time, on-going waste disposal practices at unlined landfills (i.e., open dumps)."

---

[1] "Volume" citations refer to Defendants' Exhibits Submitted in Support of Motion for Summary Judgment.

5. Recognizing a tidal wave of problems from polluting dumps to an ever increasing volume of solid waste, the Congress enacted the Resource Conservation and Recovery Act ("RCRA"), and the Comprehensive Environmental Resource Conservation and Liability Act ("CERCLA"), comprehensive laws to overhaul the management of solid waste in the United States. These laws established a new paradigm in solid waste management: that waste generators would be ultimately responsible for any problems created by the waste they generate or the disposal facility used for their waste. The concept of perpetual environmental liability was established.

6. In the preparation of these federal laws, a very important principle was explicitly stated in the RCRA Congressional Findings: [sec. 6901 (a)) (4)]:

> "that while the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies, the problems of waste disposal as set forth above have to become a matter national in scope and in concern and necessitate Federal action."

7. It was immediately evident that local governments would be significantly involved. As New York State Supreme Court Justice Robert F. Julian indicated in his deposition (Vol. VI, Exh. 24), the environmental problems created by old landfills were thrust upon local governments (P. 32 line 24).

> "But what I'm trying to convey here is those problems (speaking previously of the Ludlow's situation) are government's problems. Whoever decides this case, if they haven't governed, ought to understand that if there is a problem with a local industry in America today, especially in the Northeast, that becomes County government's

problem. That becomes City government's problem. Businesses look to government to help them. That was the case in the middle 1980's. And that — And so any CERCLA situation that might have evolved was potentially Utica and Oneida County's problem, for that reason alone."

8. The Federal and State governments moved quickly with enforcement actions and closure orders. This significantly reduced disposal capacity. We recognized that the region could be left without any local disposal capacity, unless plans were developed and action taken.

THE PRIVATE SECTOR FAILED

9. Even with the steps taken by the Counties to develop interim facilities as outlined in the affidavit of Attorney Richard Frye, the management of solid waste in Oneida and Herkimer Counties was in disarray. The ultimate outcome of the State's enforcement actions to close old dump sites was undisputed. Yet, no new private landfills were proposed. No private waste-to-energy or other technology was proposed. And no comprehensive private initiative to handle a full range of recyclables was proposed. As indicated in the 1995 Affidavit in Opposition from Judge Robert Julian at Paragraph 26:

> "The private sector was making no effort at waste reduction and recycling. No significant private sector household waste recycling program existed in this county before or during the 1980's. The private sector waste disposal industry profits and, therefore, their viability are inexorably linked to increasing the volume of waste. Large-scale community-wide recycling would have reduced waste and reduced their profit. So they would never start recycling without a public requirement to do so."

10. The private sector made no attempt to develop new disposal capacity, trying instead to keep outdated and polluting sites open as long as possible. The Ludlow Landfill, Guerriero Landfill, and the Mohawk Valley Sanitary Landfill (owned by Waste Management Incorporated) were prime local examples.

11. During this period of numerous, high profile problems, many local haulers and private scrap business owners participated in the numerous public hearings, conducted by the Counties and the Authority. Private haulers demanded public action to provide convenient new disposal options. Scrap businesses supported public efforts to increase recycling activity. Neither group was capable of achieving these results without government involvement.

12. As the solid waste planning effort was coalescing it was clear that continued reliance solely on the private sector was unacceptable, because it would have forced the Counties to settle for a series of unfavorable conditions, including:

    - Continued reliance on environmentally unfit facilities, for an unknown period of time.
    - Abandonment of the goal to reduce and recycle as much as possible, because the private sector's overriding operational dictate is to minimize the cost of disposal. Separate collection and processing of recyclables represents a higher cost, and would be discouraged in the private sector in favor of mass disposal of all waste and no recycling.
    - Waste reduction would have been discouraged because there is no incentive for reduction in private waste hauling industry.

- Small, local private haulers would have been eliminated by the largest companies that own both disposal facilities and collection companies.
- New programs and facilities for household hazardous waste or green waste compost would not be initiated because they carry additional costs.

13. Whereas reducing the solid waste stream through recycling was emerging as a principal public policy in Oneida and Herkimer Counties, the private haulers held the opposite view as confirmed by the plaintiffs' expert Dr. Mark Berkman at page 221 of his deposition (Vol. II, Exh. 16) starting at line (1):

"Q. You don't really see a benefit in reducing the waste stream, and therefore, reducing the requirement for having larger landfills?

A: No, I don't."

EARLY FORMULATION OF A REGIONAL PLAN

14. The unique characteristics of the two-county region shaped the plan which was being developed. Oneida and Herkimer Counties comprise a vast land area – over 2,690 square miles. It is diverse in geography, ranging from the Oneida Lake Plain to the Adirondack Mountains with many small, rural watersheds. It is also demographically diverse with two major urban centers (Utica & Rome) but a total of 4 cities and 29 villages all of which have relatively dense centers of population with significant socioeconomic and ethnic diversity. Surrounding the population centers which are mainly in the Mohawk Valley corridor, there are 45 towns which range from suburban to rural and remote.

15. This region was also characterized by a common problem – how to safely manage solid waste.

16. During the period of 1968-1988 there were 4 major laws enacted by the federal and state governments that defined how regional and local governments would develop solid waste management systems. The federal RCRA and CERCLA identified the need to protect public health and the environment and to conserve natural resources and Congress envisioned the need for change and innovation to meet these objectives, as noted in Sec. 6902 (a) of the RCRA:

> "the objectives of this chapter are to promote protection of health and the environment and to conserve valuable material and energy resources by – (1) providing technical and financial assistance to State and local governments and interstate agencies for the development of solid waste management plans (including resource recovery and resource conservation systems) which will promote improved solid waste management techniques (including more effective organizational arrangements), new and improved methods of collection, separation, and recovery of solid waste, and the environmentally safe disposal of nonrecoverable residues;... (10) promoting the demonstration, construction, and application of solid waste management, resource recovery, and resource conservation systems which preserve and enhance the quality of air, water, and land resources."

17. The New York State Solid Waste Management and Resource Recovery Act (Chapter 552 Session Laws of 1980), and the Solid Waste Management Act of 1988 were enacted to implement the federal laws and policies and stated as their objectives to reduce the generation of solid waste, accelerate the recovery and reuse of secondary materials, encourage a new conservation and reuse ethic, to affect a state and local partnership, and to facilitate the planning of local solid waste management

programs. The heart of the Act of 1988 is the statewide policy intended to guide both state and local efforts:

> "Section 106. State solid waste management policy. In the interest of public health, safety and welfare and in order to conserve energy and natural resources, the state of New York, in enacting this, establishes as its policy that:
>
> 1. The following are the solid waste management priorities in this state:
>
> (a) first, to reduce the amount of solid waste generated;
>
> (b) second, to reuse material for the purpose for which it was originally intended or to recycle material that cannot be reused;
>
> (c) third, to recover, in an environmentally acceptable manner, energy from solid waste that can not be economically and technically reused or recycled; and
>
> (d) fourth, to dispose of solid waste that is not being reused, recycled or from which energy is not being recovered, by land burial or other methods approved by the departments."

18. Based on common problems and a history of regional cooperation, there was a natural interest by the Counties to collaborate in solid waste management planning. Oneida County and Herkimer County had a longstanding working relationship and a track record of joint regional projects addressing significant issues. Transportation, transit, criminal justice, and land use planning were and are joint regional efforts by the two Counties.

19. The planning effort dedicated considerable resources to evaluate different technology options. In a July 1982 report, "Utica Area Resource Recovery Project –

Feasibility Study", there was an evaluation of recycling and waste-to-energy for the Utica area. The options for reduction and recycling were extensively considered in the August 1985 "Report on Waste Reduction and Recycling". As documented in the June 1986 "Final Draft Report Long Range Alternatives" the Counties evaluated the general alternatives of building a second waste-to-energy facility to serve Eastern Oneida County and Herkimer County, building a new raw waste landfill to serve the two Counties combined, building a new landfill for each County, or taking no action. It evaluated pyrolysis, composting, refuse derived fuel, mass burn technologies and region-wide recycling. Facilities throughout the Country were visited. Operational reliability and environmental compliance were reviewed. (A list of major reports completed as part of the Counties' planning efforts starting in 1966 can be found in paragraph 7 of Richard Frye's affidavit.)

20. The planning efforts also evaluated alternative funding methods. Oneida and Herkimer Counties have large areas which are undeveloped and the two major cities, Utica and Rome, have a high percentage of tax exempt property. These two factors were warning signals that using the property tax to generate the revenue for solid waste facilities would be problematic. The property tax bears no direct relationship to the level of solid waste service demanded and many properties which do demand waste service would be exempt. For these reasons, the property tax would have been a wholly unfair funding mechanism.

21. There had to be a funding mechanism that was fair — that would create a direct relationship between the volume of waste and the amount paid. Through a direct financial incentive, this would encourage waste reduction and recycling, the fundamental goals of the Counties.

22. There was an extensive network of public participation integral to the planning efforts started by the Counties and continuing through the service clubs, environmental groups, industry organizations and numerous public hearings sponsored by the County Legislatures. This public process became a foundation for the elected county representatives to develop policies and a plan and then move forward with implementation.

23. The entire picture of solid waste management was coming into focus by the mid 1980's and a series of public policies was taking shape:

    - Environmental protection had to be guaranteed.
    - Reduction and recycling had to be the top priority.
    - The system had to be fair and equitable to all waste generators.

24. The importance of a public solid waste management system was articulated by Michael Gapin in his 1995 Affidavit in Opposition paragraphs 3 & 4:

> "3. One of the fundamental principles of community planning and economic development is that there are three basic public "utility" functions which are essential to the economic and environmental well-being of a region. These are the provision of systems for a clean supply of water, for treating wastewater discharges, and for managing solid waste. In order for an area to be viable, it must be able to provide its citizens, businesses and industries with these three essential systems. For each, the system must provide safe, reliable consistent service. In order for an area to grow, to bring in new development and job creating industries, these basic pieces of public infrastructure must be in place. They are essential elements of

good economic policy. They are no less important to a region's viability than roads, bridges and schools."

"4. If a community establishes the public policies to secure and develop these systems, the community has taken a major step in enhancing and securing its future. A community, as part of these pubic policies, can establish community goals such as creating expansion capacity to attract new development. And, in the case of solid waste management, a community can develop a secure public system for the long-term that advances resource conservation, reduces dependence on disposal and provides environmental and economic security. The public policies developed in these two Counties for all three of the major public utility systems have been working toward securing the region's viability for the future. All three public utility systems are essential to our future."

ELEMENTS OF A MODERN SOLID WASTE MANAGEMENT PLAN

25. A modern solid waste management plan and system requires a unified, cohesive plan for all waste streams and all generators. Control over the waste stream is critical to document its characteristics and changes, to direct its components to the most appropriate and environmentally sound facility, to create the flexibility to change waste direction to a new facility when conditions warrant, and to provide environmental security to all generators.

26. Through this planning and public policy process the Counties came to a clear conclusion, as noted in the Affidavit in Opposition from 1995 by Judge Julian at p. 22:

"45. There was a strong, broad-based consensus among citizens, businesses, industries and local

elected officials that there had to be a regional and public system of programs and facilities to serve the solid waste management needs and objectives of Oneida and Herkimer Counties. Based on extensive interaction with the public, it was clear that they wanted a new recycling based approach. They wanted their duly elected representatives to put a solid waste management system in place that would increase and reward waste reduction, require recycling and make sure that the environment and their health and safety was protected."

27. Public control was necessary to accomplish goals that are not market driven. Waste reduction and recycling are not profitable and require public subsidy. Judge Julian in his deposition pointed out why recycling would fail if it were left solely to the private sector (P. 14 line 27):

> "The private sector waste disposal industry profits, and therefore, their viability are inexorably linked to increasing the volume of waste. Large-scale community-wide recycling would have reduced waste and reduced their profit. So they would never start recycling without a public requirement to do so."

28. The plaintiffs' own expert, Dr. Mark Berkman, confirmed the plaintiffs position in his deposition at page 129 starting at line 6:

> "because I think that everyone is better served to let the hauler decide where the least-cost disposal site for him or her to deliver the waste is. That way they'll get the lowest-cost solution to the problem".

29. Judge Julian in his deposition also commented on the wisdom of a strong policy commitment to recycling (P. 41 line 5):

> "So my analysis as an elected official who had responsibility for consensus within my caucus, as well as my district, I thought the cost benefit analysis for recycling far outweighed the risk and the problems associated therewith. And it is on that point that I think I have more experience, respectfully, than anybody in the judicial food chain of this case, as a public official listening to people day in and day out. That was my call. It was a judgment call, along with the members of the County Legislature who stood in my shoes, and the County Executive. And we thought it was sound public policy, and our Electorate agreed with us."

30. From a purely operational view, public control is necessary to inspect the waste, to screen out toxic and hazardous constituents, to direct each component of the waste stream to the most appropriate facility, and to insure the flexibility to change that direction when future conditions warrant.

31. Public control is necessary to provide the highest level of environmental protection to all waste generators within a system.

32. There was a clear sense that in order to achieve the fundamental policy goals there would have to be significant public control. In his deposition, Judge Julian made the connection between environmental protection and public control (P. 55 line 10):

> "I — I would — In the sense that I view solid waste as — not a commodity so much as a — as a risk, as an item that poses a risk to the public health and well-being, it is — that is what motivated my thinking. That is what I thought then. That is what I think now. It is the responsibility of government, under the statutory law of the State of New York, Local government, to maintain public health and

well-being ... I know of no other was to do it that would allow the government — the local government to maintain reasonable control over solid waste, which I view as an instrumentality that has potential to cause public health problems if not properly managed."

33. There was a consensus among County elected officials that we should take care of the waste we generate. The Counties had settled on the need for an exclusive public system encompassing all the solid waste generated in the region.

34. The Counties' reconfirmed their policy commitment to the public system in a 1996 when the Counties and the Authority were faced with the uncertainty of this litigation. After the Supreme Court's decision in Carbone and in light of new decisions by the Second Circuit Court of Appeals in USA Recycling v. Town of Babylon, and SSC Corp. v. Town of Smithtown, the Counties and the Authority prepared a report, "System Status and Future Alternatives" May 3, 1996. (Vol. IX, Exh. 38) Although the report carefully considered instituting region-wide public collection, a group of private haulers proposed a series of waste commitment contracts as an alternative that was ultimately pursued. In considering the report, Oneida County enacted a resolution (Vol. IX, Exh. 39), which reconfirmed their policy commitment "that the provision of a uniform, exclusive public waste recycling and disposal service through the existing Integrated System provides the best means of maximizing waste reduction, reuse and recycling services, and the only means of assuring that such services, together with environmentally secure disposal services are provided on an equitable basis to all citizens of the County;" and that "the restoration of an open market waste disposal system in the region would undermine solid waste planning efforts ...."

35. Oneida and Herkimer Counties have over 35 years of significant involvement in solid waste management issues, first in recognizing the nature and extent of environmental and public health problems, and then developing and implementing a phased plan for a comprehensive system.

36. This community made a definitive choice for a particular solid waste management system to meet its unique needs.

THE LOCAL LAWS

37. In his 1995 Affidavit in Opposition, Judge Julian set out the objectives of the Local Laws at page 23 paragraph 46:

- "To replace high volume, undifferentiated waste and disposal with a system that would match the best management method to each component of solid waste. The draft local law created separate provisions for each major category of waste.
- To make waste reduction and recycling the legally mandated top priorities for solid waste management in the County.
- To establish and expand markets for recyclables.
- To protect the public health, safety and welfare by requiring regular collection and environmentally sound waste processing and disposal throughout the Counties.
- To stop backyard burning and roadside dumping of waste.
- To make sure that both recyclables and waste would be set-out at the road, by waste generators, in a form and manner to insure its proper delivery to the recycling and disposal facilities.
- To establish a basic framework of responsibility, consistent with state and federal laws, for waste

generators, haulers, towns, villages, cities and the county or its agent.

- To conserve vital natural resources."

38. The Counties enacted the local solid waste management laws in 1988 (amended in 1989) thereby establishing the policies developed over many years as the legal foundation and means to meet the needs of the community. The local laws establish fundamental responsibilities for every citizen, each waste generator, each municipality, each hauler, and both Counties. The local laws (full text in Vol. I, Exhibits 12 & 13):

    - Require every citizen and waste generator to provide for the proper disposition of all the waste they generate. The local laws require citizens and generators to source separate recyclables so that material can be recovered and not landfilled. (Oneida County Local Law #1 of 1990 ("OCLL") Sec 2, Herkimer County Local Law #1990 ("HCLL") Sec 2).

    - Require further separation and appropriate management of household hazardous waste, green waste, construction and demolition debris and other waste streams. (OCLL Sec 4a, 4b, 5a, 5b, 6a, 6b, 7a, 7b, 8a, 86; HC Sec 4a, 4b, 5a, 5b, 6a, 6b, 7a, 7b, 8a, 8b)

    - Provide for the composting of green waste (OCLL Sec 5; HCLL Sec 5)

    - Provide for the recovery of farm and household hazardous waste (OCLL Sec 8; HCLL Sec 8)

    - Require each municipality to provide for regular and reliable collection of all categories of waste and recyclables and to prepare an implementation schedule for approval by the Counties. (OCLL Sec 2, 4a, 5a, 6a, 7a; HCLL Sec 2m 4a 5a 6a 7a)

- Direct the disposition of all waste, therein providing a means to manage each component waste stream, to inspect recyclable and nonrecyclable waste, and to stop backyard burning and roadside dumping.(OCLL Sec 10, 11; HCLL Sec 10, 11)
- Provide for the competitive marketing of all recyclables received by the Authority, and provide for the direct private marketing of recyclables by generators (OCLL Sec 3, 6; HCLL Sec 3, 6)
- Require all waste haulers to obtain a permit (OCLL Sec 10; HCLL Sec 10)

39. The local laws establish a means to integrate both the handling of solid waste (by requiring source separation by the citizens and all generators and by simultaneously requiring all public and private haulers to deliver segregated material to various County designated public facilities) and ultimately a source of funding that would both encourage waste reduction and recycling and pay for wide range of reduction and recycling facilities and programs.

THE ONEIDA-HERKIMER SOLID WASTE MANAGEMENT SYSTEM

40. With the vision of the Counties, the elements of a comprehensive regional plan and the legal foundation of the local laws, the Counties and State created the Authority as the institutional means to translate these efforts into a concrete realization of the Counties' goals.

41. By 1991 there were no private facilities remaining in Oneida County or Herkimer County for the disposal of municipal solid waste. The only public facility in operation was the Oneida County ERF which had capacity for only a small quantity of the region's waste.

42. In 1991 the Authority adopted a final Local Solid Waste Management Plan which was approved by the State. The

Plan is at Vol. IX, Exhibit 37. The first paragraph of the Plan at p. 4 states:

> "The overall goal of the Oneida-Herkimer Solid Waste Management Authority is to provide for maximum levels of waste reduction and recycling, coupled with the development of environmentally and economically sound programs and facilities for the remainder of the waste stream. It is the intention of the Authority to continue to increase reduction and recycling programs and to plan all facilities to reflect these maximum feasible recovery levels."

43. This "overall goal" of "maximum levels of waste reduction and recycling" of the Oneida-Herkimer system stands in sharp contrast to the plaintiff haulers' view of the benefit of waste reduction as stated by their expert, Dr. Mark Berkman at page 221 of his deposition starting at line (1):

"Q. You don't really see a benefit in reducing the waste stream, and therefore, reducing the requirement for having larger landfills?

A. No, I don't."

44. The Authority has gone forward and developed an integrated system of programs and facilities to implement the plan. The system operates beginning with the requirements of the Local Laws that all generators and haulers deliver each component of the overall waste stream to the designated facility. An integrated system fee is charged only on nonrecyclable waste, thereby creating the most direct financial incentive to reduce and recycle. A portion of the revenues from the integrated system fee is then used to pay for the reduction and recycling facilities and programs.

45. The Authority serves the two-county population of just under 300,000, owns over 1,000 acres of land, owns and

operates 8 facilities with 58 employees and an annual budget of $24 million. The major elements of the Oneida-Herkimer integrated system are noted below and a timeline of facility development is at Appendix A.

46. The Authority system includes waste reduction programs.

    a. Waste audits for over 350 major industries, businesses and institutions. Appendix B describes the waste reduction measures taken by 17 representative industries.

    b. Distribution of over 100,000 posters explaining actions residents can take to reduce waste.

    c. Multi-media advertisements showing consumers how to purchase products with less packaging.

    d. A waste reduction and recycling curriculum for grades K-8 for each school in the two counties.

47. The Authority system establishes source-separation of recyclables as a means to most effectively maximize recycling and reduce non-recyclable waste disposal in our region. The Local Laws require waste generators to separate recyclable materials from waste at their source and either market them directly or place them at roadside (curbside) in a condition suitable for acceptance at Authority facilities. The system creates a direct economic incentive to recycle because no fee is charged for delivery of recyclables. The main components of the recycling program in Oneida-Herkimer are:

    a. 37 different household materials that can be recycled with only 2 separations required. A list of recyclables can be found at Appendix C.

    b. A $10 million Recycling Center that segregates, processes, and markets household, commercial and industrial recyclables.

    c. Authority responsibility as the market of last resort.

d. Recovery of specialty items like computers, bulk metal and appliances, motor oil, automobile batteries, antifreeze, wood pallets and latex paint.

e. A green waste compost facility for brush, leaves, and grass clippings.

f. A clearing-house for private recycling activity.

g. Distribution of over 500,000 recycling instruction posters.

48. The Authority recycling programs received the Governor's 2001 Award for Excellence.

49. Recycling requires financial subsidy. To cover operating and debt service expenses, the Authority has used $29.5 million from the integrated system fee for 1991-2002. This is the financial commitment necessary, in addition to the revenue received from the sale of recyclables, to cover all the costs of recycling. This illuminates a choice made by this community to handle its waste in a particular way, through recycling, that is not the lowest cost approach.

50. The Authority system includes an extensive waste detoxification program. The Local Laws require the separation of household hazardous waste and farm hazardous waste and the delivery to a designated facility. This service is funded by a portion of the integrated system fee and no direct fee is charged to residential or agricultural generators. If a fee were charged, because of the toxic and complex nature of the material and the associated high cost for proper disposal, there would be little if any participation. This service is the only alternative available to residents and generators of small quantities of hazardous waste who cannot afford the high cost of private service. The Authority system includes facilities and programs to accomplish this requirement of the Local Laws:

a. A permanent Household Hazardous Waste facility that removes pesticides, herbicides, pool chemicals, photographic chemicals, laboratory chemicals, lead paint, solvents, thinners, contaminated fuel, batteries, mercury light fixtures, electronics and numerous other hazardous materials. Annual totals can be found at Appendix D.

b. A conditionally exempt small quantity generator program for businesses and industry to remove specified quantities of hazardous waste.

c. A certified CFC removal and containment program for refrigerators, air conditions and other appliances.

51. The Oneida-Herkimer system includes facilities for disposal of nonrecyclable waste, currently accomplished through contracts with two public and one private facility. These in combination provide for the safe disposal of approximately 250,000 tons of nonrecyclable waste per year. The private facilities used for disposal are procured by the Authority through public bidding. Therefore, generators are made aware of the method of disposal, the location and identity of the disposal facility, and the cost of disposal. Total nonrecyclables processed by the Authority per year can be found at Appendix E.

52. The Authority contracts with these landfill facilities only after interviewing state regulators and an indepth review of the site geology, surrounding land use, surface water and groundwater conditions, regulatory compliance, leachate collection and monitoring, air emissions monitoring and treatment, other users of the facility and the character of their waste, and other factors relevant to the environmental integrity of the facility.

53. In the case of the private landfill referred to paragraph 51, which receives over 90% of the nonrecyclable waste handled by the Authority, the facility is selected through

an open competitive bidding process which is locally and nationally advertised.

54. Before delivery to the contract disposal facilities, the local collection trucks used by public and private haulers deliver the nonrecyclable waste to one of three Authority transfer stations which provide:

    a. Centrally located facilities, convenient locations for haulers, contractors, businesses and individuals to discharge nonrecyclable waste.

    b. Enclosed buildings to discharge waste, spread it out, inspect it, remove incompatible and recoverable materials, and then load it into transfer trailers.

    c. A means to aggregate waste delivered in 350 loads per day into about 35 large transfer trailers.

55. Waste delivered to the transfer stations is carefully inspected to identify and remove toxic and hazardous materials and identify any other problems. New opportunities for recycling are also identified through this process. Inspection on the transfer station tip floors is coordinated with other monitoring, tracking, and inspection of solid waste and enforcement critical to protect public health and the environment. Appendix F is a copy of the Authority's "Non Compliance Management Guidelines", a memo explaining the procedures for waste tracking and audits, and a copy of the facility rules and regulations. The Authority system includes:

    a. Licensing of all haulers.

    b. Cradle-to-grave documentation of major industrial wastes through uniform tracking documents.

    c. Inspection of nonrecyclable waste and removal of hazardous items and other problematic wastes at each Authority transfer station. A summary of the penalties

assessed on loads of waste containing recyclables can be found at Appendix G.

d. Inspection of recyclables to remove contaminants and to identify new opportunities.

e. Review of set out practices by residents, businesses, industries and institutions.

f. Prosecution by town, village, city, county and state law enforcement authorities of the prohibitions on roadside dumping and backyard burning – estimated to be 80 violations annually.

g. Prosecution by the Authority against haulers that commingle source separated recyclables with solid waste.

56. The Authority system includes a proposed landfill facility to insure safe and reliable local disposal. The Authority has to date invested nearly $12 million in the environmental, legal, and permitting work necessary to develop this state-of-the-art facility. It will provide a 62 year useful life and will employ a double composite liner system, full leachate collection and treatment, gas collection and energy recovery, and over 100 groundwater monitoring wells.

57. The Authority system also includes long range planning to gather accurate data concerning waste volumes and characteristics, to review and evaluate industry trends, market conditions, regulatory changes, legislative proposals, scientific research, and advances in technology. This allows the Authority to plan intelligently for the solid waste management needs of Oneida and Herkimer Counties. The Authority, as provided in the New York State Solid Waste Management Act of 1988, is a Planning Unit and developed a local solid waste management plan. The formal steps for this plan, started by the Counties and

completed by the Authority, are outlined at Appendix H. In addition to the above noted ongoing planning activities, reports and evaluations have been done to address critical issues that have been on the future configuration of the system:

a. An evaluation of pay-as-you-throw systems which served as the basis for several local municipalities to adopt per bag systems. ("Solid Waste Collection and Disposal: Billing and Payment Alternatives", 1988).

b. An evaluation of providing a common recycling container for each household in the region.

c. An evaluation of the feasibility of co-composting green waste and wastewater treatment sludge. ("Sewage Sludge Management Alternatives", 1993 and "Evaluation of Municipal Solid Waste Composting Technologies", 1993).

d. A study of the feasibility of recycling construction and demolition debris ("Construction and Demolition Debris Management and Equipment Evaluation", 1991).

e. An evaluation of a waste wood energy recovery unit that could process pallets.

f. An evaluation of the cost of upgrading the units used locally to manage biomedical waste, ("Technical and Cost Analysis For Upgrading Existing Infectious Waste Incinerators", 1988).

g. An evaluation of the impact of new air emissions standards for waste-to-energy facilities and the impact of energy revenues on the feasibility of waste-to-energy ("Energy Recovery Facility Future Options", 1994).

h. A report entitled "Alternative Municipal Solid Waste Processing Technologies", 1993.

i. Consideration of alternative waste processing technologies, through an RFP for a demonstration project. (2003)

j. An evaluation of region-wide public collection ("System Status and Future Alternatives", May 3, 1996). (Vol. IX, Exh. 38).

k. A long term economic analysis comparing a local landfill option with the export option in terms of cost and other factors ("Market Profile For Municipal Solid Waste Management in Oneida and Herkimer Counties, New York" Arthur D. Little, 1997). (Vol. IX, Exh. 36).

58. Through the revenue generated by the collection of the integrated system fee, the Authority and Counties are able to conduct an extensive educational and public information program including:

    a. Waste and recycling audits for businesses and industries.

    b. Several university science laboratory courses are taught at the recycling center.

    c. Tours of the Recycling Center, Household Hazardous Waste Facility and Green Waste Compost Facility to over 12,000 individuals from various schools, industries, businesses, municipalities and foreign governments.

    d. Yearly Recycling Champion Awards to outstanding examples of local businesses, institutions and municipalities who recycle in innovative ways.

    e. A "Just Mow It Program", which encourages residents to compost or mulch their grass clippings instead of bagging and disposing of the clippings.

f. "ComPoster", a practical guide to managing organic waste at home.

g. A "Recycling is Good Business" program for area businesses, industries, and institutions. The program focuses on methods to reduce and recycle wastes at the work place.

h. A comprehensive website.

i. Assistance to environmental benefit groups for clean-ups at environmentally sensitive locations, donations and other programs.

59. The system developed by the Authority has transformed solid waste management in Oneida and Herkimer Counties into a highly responsive, environmentally sound public system. The environmental commitment demonstrated in the system was noted by Dr. Stavins in his deposition at page 165 starting at line 7:

> "When I say high level, I don't want to, you know, be overly dramatic. I've spent a lot of time in my career working with local governments, businesses. It is rare that I have actually experienced one, this is neither praise nor an insult, it is actually a neutral characterization, it is rare that I have experienced the degree of obvious concern for the environment as the Authority happens to have."

THE BENEFITS

60. The system allows the Counties to efficiently and effectively fulfill their traditional local government role of providing safe, reliable, and economical sanitation service to the public, and thereby protect the health, safety and welfare of the public and environment. A full description of benefits can be found in the Response to Interrogatories found at Vol. I, Exhibit 11.

61. The Oneida-Herkimer system produces a vast array of public benefits. The system maximizes reduction, reuse, and recycling of all solid waste generated within the two county region; provides safe and environmentally secure means of disposal of the remaining waste stream; avoids generator liability for area residents for disposal of waste in non-secure facilities; apportions the costs of solid waste management among all citizens of the region on the basis of amounts of waste generated; stimulates competition in private collection services by allowing for an even playing field in disposal costs for haulers; provides financial stability for the activities undertaken by the Authority.

62. Whereas the Authority has established a direct economic incentive to reduce and recycle, the haulers want to see as much waste as possible produced. Their expert Dr. Mark Berkman wants to preserve the archaic notion that there is no benefit to reducing the waste stream, Berkman deposition page 221 starting at line (1):

"Q. You don't really see a benefit in reducing the waste stream, and therefore, reducing the requirement for having larger landfills?

A: No, I don't."

63. The integrated system provides an ongoing evaluation so that changes can be made to existing programs and facilities and new ones can be regularly considered that may provide an improved means of accomplishing the goals of the system. As in the past, new facilities and programs may not be the cheapest approach, which is the only approach which would be followed by the private sector. Ongoing planning with public participation make the system continually adaptive and preserves the community's ability to

provide a system to meet its unique needs. For example, the Authority is currently considering a partnership with a private company that would install a 3 stage waste pyrolysis program for the ultimate production of natural gas and electricity for the region's largest industrial park. This proposal would significantly advance the waste reduction, recycling, and resource recovery objectives of the Authority. This also meets the goals of the RCRA and State Solid Waste Management Laws that envisioned innovation and new approaches to reduce waste and conserve resources. To achieve these goal, the Authority has to be able to redirect suitable components of the waste stream to the facility. Only local government is in the position to foster this kind of innovation because it may not be the cheapest approach in the short-term.

64. The benefits to the citizens of the Counties from the waste inspection, tracking, enforcement, and household hazardous waste system elements are:

    a. Cleaner, safer waste streams that reduce toxic leachate and air contaminants.

    b. Reduced environmental liability for all generators.

    c. Reduced illegal dumping and associated pollution.

    d. Removal of 31,309 gallons of pesticides, herbicides and other chemicals.

    e. Removal of 34,605 gallons of solvents and thinners.

65. The benefits to the citizens of the Counties from the recycling elements of the system are:

    a. Direct economic incentive to recycling because no fee is charged for the delivery of recyclables.

b. Over 400,000 tons of recyclable material have been processed by the Authority since the opening of the Recycling Center (materials recovery facility) in 1991. Sale of recyclable materials has brought over $14 million, in support of the system. The system's Recycling Center is capable of processing seven grades of paper, six grades of plastic, four grades of glass, two grades of aluminum, and ferrous metals.

c. 400,000 tons of recyclables processed represents over 1.6 years of regional waste generation not consigned to landfill disposal.

d. Recycling avoids disposal costs — estimated at $18,000,000.

e. The Authority is the market of last resort for many area businesses, so area businesses can bring the recyclable materials to Authority during times when there is no other cost effective market or outlet available for such recyclable materials.

f. The Authority's receipt of recyclables during poor market periods provides support for private sector recycling activity. Generators and haulers can bypass the Authority when markets are favorable. Markets for recyclables fluctuate significantly, see Appendix I.

g. By being continually available as an outlet for recyclable materials, the Authority's system helps solidify the commitment of the public to recycling. Consistent availability for the receipt of recyclables avoids inconsistent messages based on fluctuating market conditions, and reinforces the habit of recycling in residential generators.

h. A single set of recycling instructions to establish consistent practices throughout the region

enhancing both participation and the quality of recyclables.

i. The Recycling Center provides a full range recyclables processing services which have never been offered by any other private entity in the Oneida-Herkimer region.

j. The computer recycling program, one of the first in the country, has provided for the recovery of over 1,600 computers and 580 monitors. The high grade metals (such as silver, gold, platinum, palladium, and copper) are recovered for reuse, as are the low grade plastic components.

k. Over 116,692 gallons of paint, taken at no charge to residents has been recovered or recycled.

l. Over 106,090 gallons of used oil has been recovered and refined and reused.

m. Over 8,343 gallons of antifreeze has been recycled.

n. Over 86 tons of automotive batteries have been recycled.

o. The local laws comply with and implement the State legislation that requires every community to enact a source separation law.

p. Since the establishment of the Compost Facility over 140,000 tons of green waste has been diverted from landfill disposal for processing as compost.

q. The Authority has sold or given away over 50,000 cubic yards of compost product to residents and commercial users, (schools, golf courses, parks, etc.).

r. The Authority has sold over 20,000 bags of finished compost product to residents since 1997. Purchases of compost product by residents and businesses close the recycling loop for green waste by re-using waste products generated locally.

s. The Compost Facility provides services which have never been made available by any other private entity in the Oneida-Herkimer region.

t. Mills throughout the country convert Oneida-Herkimer recyclables into new products, see Appendix J.

u. Recyclables processing and marketing services have been made available for materials delivered by neighboring municipalities for tipping fees. Over 17,000 tons, from municipalities without processing capability, or equivalent access to markets, have been received since 1991.

66. The benefits to the citizens of the Counties from the current system elements for managing nonrecyclable waste are:

a. The safe disposal of 250,000 tons of waste per year on a continuous basis for over 11 years.

b. Generators are made aware of exactly where their waste is taken, and what the environmental track record is for the disposal facility.

c. Waste generators are protected by the Authority from future environmental liability.

d. All users of the system are protected from liability because of the rigorous program to characterize waste, screen and enforce.

e. Transportation to the ultimate disposal facility is provided by the Authority, thereby leaving

generators and haulers only with the responsibility and cost to deliver waste to a local transfer site.

67. In the event that the Authority constructs and operates a publicly owned landfill in the future, such a facility, operating within the integrated management system and conjunction with the Local Laws would have the following additional benefits:

    a. The public interest in maximizing recycling and reducing the amount of waste disposed of in the landfill would complement the Authority's institutional interest in preserving the available capacity of the landfill as long as possible. The landfill will be constructed in a series of sequential cells, constructed two at a time, to a total of 19 over the sixty year projected life. Reduction and recycling will prolong the life of each cell thereby improving the long term financial standing by leveling public investment.

    b. State legislative prohibitions against the acceptance of out-of-region waste at Authority facilities are in effect and serve to prolong the life of the facility. The prohibition against importing underscores the fundamental objective of the Counties – to fulfill a traditional local governmental option to provide sanitation service – and in this instance, only for the residents, businesses, industries and institutions of Oneida and Herkimer Counties.

    c. Restrictions against acceptance of non-recyclable waste generated outside of the Counties would preclude liability risks arising from the commingling of local waste with waste from unknown sources.

d. Environmental conditions and operations would be directly within the control of the Authority and thereby fully accessible to the public.

e. Generators will be relying on a single, new facility with local, known origins of waste. Generators will no longer rely on multiple sites serving massive numbers of generators from a broad geographic area. New construction according to current NYSDEC regulations would provide generators the best assurance against environmental injury and eliminate future risk of CERCLA and other potential liability arising from use of private sites in other locations.

f. The proposed landfill will be less expensive than the cost of exporting based on an update for the landfill construction cost done in late 2002.

g. Use of the proposed landfill will reduce fuel consumption and the associated air pollution and cost.

h. It will guarantee Oneida and Herkimer Counties' disposal capacity even if private facilities are fully subscribed or are closed for regulatory or other reasons.

i. It will protect the Counties against the uncertainty and cost of tariffs, or other restrictions that may be authorized by Congress, on waste importation.

j. It will protect the Counties against the uncertainty of costs resulting from industry consolidation.

68. As stated in the report done in 1997 by Arthur D. Little, Inc., "Market Profile For Municipal Solid Waste Management in Oneida and Herkimer Counties, New York", in their Findings and Conclusions:

"If the Authority proceeds with obtaining the necessary approvals and permits for development of the proposed local public landfill, this will help the Authority avoid many of the uncertainties noted herein and provide flexibility and leverage for future decision making. In particular, this would provide a disposal alternative based much more on actual costs than on market conditions. Specifically, it would reduce the influence of market uncertainties such as price increases, facility closures and changes in laws governing interstate transport or flow control. Permission to build its own landfill would also give the Authority greater flexibility in managing local industrial and special wastes. In addition to eliminating much uncertainty in the costs to be incurred, having this alternative at a minimum would be expected to significantly enhance the Authority's leverage in contracting with disposal service providers, should it choose to do so, Once approvals are obtained, the Authority can reevaluate market conditions and all key factors affecting its decisions."

CONCLUSION

69. The public benefits of the Oneida-Herkimer solid waste management system are in stark contrast to the methods of the past and the purely market diverse approach of the private sector. Very simply, the plaintiffs seek to nullify the local laws and create a circumstance where they could substitute their judgment for that of the generator, local elected officials, and the community with respect to whether or not to recycle and how to manage each component of the waste stream. Left solely to the private market, there would be no separation of recyclables, green waste, or household hazardous waste and there would be no promotion of waste reduction because all of

these activities either cost more than disposal or they would reduce the volume of waste and their profits.

70. After experiencing a 20 year environmental nightmare, in 1988 Oneida County and Herkimer County enacted local laws they knew were absolutely necessary to solve the problem. This was a response to real and prevalent problems. This was a conscious decision by a community's elected officials who listened to their citizens. This was a normal response, typical of many communities across the Country, and recognized as such by the Second Circuit of Appeals, in United Haulers:

> "In the past, we have held that a municipality "has legitimate—indeed, compelling—interests that are served by its waste management program." *USA Recycling*, 66 F.3d at 1288. In *USA Recycling* we went so far as to state that "[t]he local interests that are served by consolidating garbage service in the hands of the town-safety, sanitation, reliable garbage service, cheaper service to residents-would in any event outweigh any arguable burdens placed on interstate commerce."

The final plan and the system built on those Local Laws also represents a conscious decision by a community for a particular way to manage solid waste – a way that is finely tuned to their needs and the character of the region.

/s/ Hans G. Arnold
Hans G. Arnold

Sworn to before me this

10th day of April, 2003

/s/ Mary Brendeu Daishan
Notary Public-State of New York
My Commission expires 1/14/2007

Oneida-Herkimer Solid Waste Management Authority
311 Turner Street, Suite 401
Utica, New York 13501
733-1224 or 866-6592

FINAL LOCAL SOLID WASTE MANAGEMENT SYSTEM PLAN

May 20, 1991

INTEGRATED SOLID WASTE MANAGEMENT SYSTEM

	Page
TABLES	2
FGEIS APPENDICES	3
EXECUTIVE SUMMARY	4-5
1. Background	6
1.1 New York State Solid Waste Management Act of 1988	7
1.2 New York State DEC Solid Waste Management Plan	7-9
1.3 Part 360 Regulations	13
1.4 Oneida-Herkimer Solid Waste Management Authority	13-17
1.5 Background on DGEIS and DLSWMP	17-20
1.6 Public Comment Opportunities	20-23
1.7 Waste Quantification and Characterization Summary	23-25
2. General Objectives & Policies	26
2.1 Public Involvement	27-30

	2.2 Monitoring and Oversight	30-32
	2.3 Host Community Compensation	32-36
	2.4 Importation	36
	2.5 Sizing	36-37
	2.6 Ownership	37
	2.7 Technology	37-38
	2.8 Siting	38-44
	2.9 Economic Analysis	44
3.	Solid Waste Reduction	45-51
4.	Solid Waste Recycling and Reuse	52-71
5.	Solid Waste Processing	72-80
6.	Residue Disposal	81-88
7.	Household Hazardous Waste Management	89-96
8.	Construction and Demolition Debris Management	97-103
9.	Regulated Medical Waste Management	104-110
10.	Wastewater Treatment Sludge Management	111-115
11.	Transfer Stations	116-119
12.	Interim Measures	120-131

TABLES

1.2-1	NYS Planning Guide – Local Plan Cross-Reference	10-12
1.7-1	1995 Waste Management Summary	21-A
1.7-2	2010 Waste Management Summary	21-B
1.7-3	Total Waste Stream Reduction & Recycling	22-A
1.7-4	Compactor Waste Reduction & Recycling	22-B
1.7-5	Reduced Waste Processing Scenario	22-C
1.7-6	Increased Waste Processing Scenario	22-D

The following is provided for cross-reference to the Final Generic Environmental Impact Statement (FGEIS).

FGEIS APPENDICES

Volume 1 Appendix A	Comments and Response Letters (all comments were also summarized in FGEIS text with corresponding responses, supplementing response letters contained herein).
Volume 2 Appendix B	Comments and Responses
Volume 2 Appendix C	Legislation, Involved and Interested Agencies/Government Officials' Comments
Volume 3 Appendix D	Transcripts, June 7, 1989, June 16, 1989, June 19, 1989, July 11, 1989, July 13, 1989
Volume 4 Appendix E	Transcripts, August 21, 1989, September 19, 1989, November 20, 1989, November 30, 1989, December 11, 1989
Volume 5 Appendix F	Transcript, December 18, 1989
Volume 5 Appendix G	Form Letters and Petitions
Volume 5 Appendix H	Supplemental DGEIS, Candidate Sites 023-TR2, 023-TR3, and H24-NE1 -- November 1989
Volume 6 Appendix I	Supplemental DGEIS, Candidate Sites 015-TR2, 023-TR1, 023-TR4, and H24-DE1 -- May 1990
Volume 6 Appendix J	Evaluation of Hydrogeologic Conditions at Mohawk Valley Sanitary Landfill, Frankfort, New York

Volume 6 Appendix K	Hydrogeologic Evaluation of three Landfill Sites in Oneida and Herkimer Counties New York
Volume 7 Appendix L	Comprehensive Recycling Analysis
Volume 8 Appendix M	Miscellaneous

EXECUTIVE SUMMARY

The overall goal of the Oneida-Herkimer Solid Waste Management Authority is to provide for maximum levels of waste reduction and recycling, coupled with the development of environmentally and economically sound programs and facilities for the remainder of the waste stream. It is the intention of the Authority to continue to increase reduction and recycling programs and to plan all facilities to reflect these maximum feasible recovery levels.

The immediate and foremost priority is the completion of the Oneida-Herkimer Recycling Center. The operation of this facility will provide the best possible method for processing and marketing 200 tons per day of recyclables. Its capacity may be increased in the future if participation rates warrant. Market contracts are in place for processed newspaper, corrugated cardboard, high grade paper, magazines, tin cans, aluminum, glass, and PET, PVC and HDPE plastics. Currently, the Authority is also actively seeking markets for other paper (i.e. junk mail) and other plastics (i.e. polypropylene). The Authority will continue to employ a rate structure which rewards and promotes reduction and recycling. The Authority will also expand education and other efforts to improve participation in recycling and increase recovery rates.

The Authority will continue efforts to improve the operation of the Energy Recovery Facility (ERF). The feasibility of new air pollution control equipment to improve acid gas emissions will be evaluated in the coming year. Additional measures, as set forth in the plan, will be taken to monitor environmental conditions relative to the facility.

The Authority believes that a waste-to-energy facility can be safely and efficiently operated and can therefore be part of an integrated system plan. At the same time, the Authority will

actively consider other waste processing options to meet its objectives. The full range of options for new waste processing capacity will be considered and evaluated with respect to environmental and economic factors. With respect to waste-to-energy, this may involve continued operation of the existing facility closure of the existing facility, expansion of the existing facility, construction of a new facility or some combination thereof. The waste-to-energy component will be developed as part of the overall integrated plan and may be done in combination with some other waste processing capacity. The siting for any new waste processing capacity will follow an amended procedure to be developed by the Authority.

The Authority intends to identify a new candidate landfill site or sites which will be arrived at by using an amended siting methodology. The Authority believes that it is essential to identity such a site to meet the objectives of sound environmental and economic management. For an interim period the authority will negotiate a contract for disposal capacity. After further evaluation, the Authority may consider some operation or program at or adjacent to a closed or closing municipal landfill site. This could range from a simple compost operation to an interim municipal solid waste landfill cell.

The Authority recognizes not only the critical nature of providing a sound solid waste management system, but also of providing opportunities for public involvement and compensation to affected parties. The Authority is committed to an extensive program for public involvement, especially as it relates to the development of a siting methodology. Monitoring and oversight of Authority operations is provided in numerous ways and is welcomed. A comprehensive approach will be implemented for evaluating and then fairly compensating affected property owners, adjacent property owners, and the community "hosting" the major facility. The particular interests and desires of affected individuals and

community representatives will be closely considered by the Authority and will be reflected in all decisions.

Oneida and Herkimer counties are decreasing their reliance on landfilling by moving toward their goal of recycling as much as possible. At the same time, landfill space is rapidly diminishing in the two counties. It is critical that the Authority keep working on developing the new landfill space this area will urgently need, in the future, as part of an integrated solid waste project.

In summary, the Authority is committed to providing an integrated solid waste management system which first maximizes reduction and recycling, is as sensitive as possible to local concerns, is environmentally and economically sound, and is flexible enough to adjust to changing conditions, while at the same time ensuring the proper disposition of all types of solid waste.

* * *

1.6 Public Comment Opportunities

The Oneida-Herkimer Solid Waste Management Authority has provided opportunities for residents of Oneida and Herkimer counties to comment about the two-county solid waste management project during the project's development to date. The Authority is committed to continuing to provide these opportunities, first because it is the proper and responsible course of action, and also because public comment is needed to meet its own objectives, and to comply with the State Environmental Quality Review Act.

The Authority carefully considered public input during the development of the Draft Generic Environmental Impact Statement and Local Solid Waste Management Plan, and provided extensive opportunities for public comment after the release of the DGEIS.

There also were opportunities for comment before the Authority was created through legislation approved in 1988 by the State Legislature, the Herkimer County Legislature, and the Oneida County Board of Legislators.

The earlier opportunities included hearings that were scheduled at the beginning of the work on the DGEIS and the Local Solid Waste Management Plan. On January 7, 1988, a hearing was held to address the overall scope of the solid waste project for Oneida and Herkimer Counties. Later, on July 12, 1988 and July 13, 1988, hearings focused on the question on what scope of issues, including siting issues, should be included in the Draft Generic Environmental Impact Statement. Transcripts of these hearings are available for public use in the office of the Oneida-Herkimer Solid Waste Management Authority.

In 1989, when the Authority assumed responsibility for the project from Oneida and Herkimer Counties, it took steps to provide for public comment opportunities in a number of different forums.

As a result of the Authority's decision to considerably extend the public comment period on the DGEIS, hundreds of residents of the two counties had the opportunity to add their comments, criticisms or recommendations to the public record on that document. During the eight-month public comment period following the release of the document on May 15, 1989, the Authority received approximately 10,000 letters or form letters about the DGEIS and the Local Solid Waste Management Plan.

Some commentors questioned certain sections of the DGEIS, others discussed the impact the solid waste project could have on their property or town. Although the Authority's formal response to these many comments is contained in the Final Generic Environmental Impact Statement, the

Authority also provided answers to the public comments, additional information and resource material wherever possible. Throughout the public comment period, the Authority and its staff provided these responses to inquiries received in person at Authority meetings, at the Authority's office, by phone, or by letter from hundreds of residents.

A number of children from area schools sent letters to the Authority regarding the preliminary landfill sites and incineration. The letters were done by classroom groups apparently in response to topics provided or suggested by their teachers. Most letters expressed strong opposition to a particular candidate site or the concept of landfilling. The letters were reviewed by Authority members and staff.

Complete copies of the children's letters are available for review during business hours at the Authority office.

The Authority demonstrated its commitment to providing public comment opportunities by doing the following, directly or through its staff:

- Setting aside a regular public comment period at each Authority meeting so that members of the public, representatives of area organizations, and outside experts could be heard.
- Holding 15 Authority meetings during the eight-month public comment period. During Authority meetings, which are open to the public and were very well attended, the agendas included topics of interest to area residents, such as discussions of recycling, construction of the Materials Recovery Facility, preliminary hydrogeologic tests, and area landfill capacity.
- Holding more than 10 hours of public hearings on the DGEIS and Local Solid waste Management Plan. On July 11, 1989, the Authority listened to speakers during almost six

hours of its public hearing in Oneida County, held in the City of Utica. On July 13, 1989, the Authority heard comments and information during its hearing at Herkimer County Community College, which lasted approximately four and a half hours.

• Scheduling two additional hearings on certain issues addressed in the DGEIS and Local Solid Waste Management Plan. Those were: the Authority's December 11,1989 hearing at Herkimer County Community College on the Village of Herkimer on the consideration that should be given to agriculture in the siting of solid waste facilities and the Authority's December 18, 1989 public hearing in the City of Rome on the potential role of waste-to-energy in the area's solid waste project.

• Providing two detailed briefings about the development of the solid waste project and the DGEIS at meetings of the Oneida County Environmental Management Council.

• Presenting information and answering questions about the DGEIS and landfill siting issues at the invitation of the Newport Town Board for a meeting held in that town. An estimated 500 people attended the meeting.

• Meeting informally with an ad hoc group of area residents, several of whom live near potential sites listed in the DGEIS, for briefings, discussions and responses to questions.

• Providing a presentation about the proposal contained in the DGEIS and Local Solid Waste Management Plan at the request of the Verona Town Board for its area residents. That presentation included opportunities for questions directed to the Authority's representatives.

• Meeting with representatives of the Trenton Citizens' Advisory committee to discuss the proposal and provide answers to committee member's questions.

• Meeting regularly with solid waste haulers front the two-county area during the development of the DGEIS and Local Solid Waste Management Plan. Those meetings contained lengthy discussions about the whole approach that would be taken to implementing recycling in Oneida and Herkimer Counties.

• Providing presentations for community organizations and service clubs throughout the area about the proposal, including discussions of the solid waste problem facing this area, the role of recycling, the need for waste reduction and the role each citizen can play in solving the problem. The presentations included question and answer periods.

• Providing presentations for school groups in the two counties. As appropriate to a particular grade level, those presentations and the question and answer periods focused on one or more of the following: The importance of recycling, the need for each citizen's participation in recycling, the ability of each student to consider and change his or her own waste disposal habits, the reason for the high priority given to composting of yard waste in the two counties, the strict standards in effect for landfill construction and operation, and the need for waste reduction.

* * *

2.1. Public Involvement

The Authority has a continuing interest and commitment in working with the general public, elected officials, schools and businesses. This ongoing effort has provided two benefits: it better informs the Authority about concerns and interests from various segments of the population and it helps these different segments of the public understand the Authority's work on a long-term, solid waste project.

One of the top priorities for the Authority, since its inception in 1989, has been to recycle as many materials as possible in

the Oneida-Herkimer County area. The Authority is responsible for implementing the solid waste/recycling laws adopted by Oneida County and by Herkimer County in 1988. The Authority also is responsible for constructing and operating the 200 ton-per-day Recycling Center which was begun by the two counties.

Recycling has a key role in the long-range project needed by the area. The more materials that are recycled, the less waste left to be sent a landfill or an energy recovery facility. Other related activities, such as mandatory composting and waste reduction, also are already being used to further this goal.

Public involvement contacts with the various groups have occurred both formally and informally. Now, it is the Authority's intention to establish a formal Recycling Advisory Committee to assist with the important tasks of bringing the Recycling Center on line and adding additional recyclables to the current list of requirements. Those additions will be made possible by the opening of the Recycling Center.

This Recycling Advisory Committee will be comprised of representatives from the two counties. It will help the Authority assess recycling at the local level by providing a vehicle for the continuing exchange of ideas. It will consider ways to increase the volume, ease, and efficiency of recycling both from hauler and resident perspectives.

All Authority actions will comply with the State Environmental Quality Review Act, which guarantees public involvement at the different stages of a project.

* * *

3.1 Observations

A discussion of the basic concept and approaches to waste reduction (and toxics removal) is contained in Section 2.1 of the DGEIS. While there are a limited number of definitive and effective actions which a local jurisdiction can take, the Authority firmly believes that waste reduction must be pursued at all levels. Some actions portrayed as reduction are truly recycling and therefore must be considered differently when developing programs and facilities.

Both the Solid Waste Management Act of 1988 and the New York State Solid Waste Management Plan place waste reduction as the top priority. The Plan targets a 10% reduction level by 1997. Yet, there have not been any major state or federal level policy initiatives aimed at waste reduction. At the local level, it has been difficult to gauge any reduction because of changed collection and disposal practices. Information developed by the New York State Legislative Commission on Solid Waste, "Where Will the Garbage Go" (annual update) indicates that, in fact, more waste is being generated each year on a statewide basis.

This presents a difficult circumstance for the Authority in making long range plans and facility commitments. On the one hand, the Authority puts reduction as the top priority, and the State's 10% goal is reflected in the Authority plan (see Tables 1.7-1 and 1.7-2). On the other hand, there is no evidence that waste volumes are decreasing and no comprehensive state or federal program capable of achieving 10% reduction has even been started. The Authority does not want to make any program or facility decisions which are undersized, if the 10% goal is not achieved. The result would be the landfilling of more raw, unprocessed waste – a result counter to an important Authority policy. Conversely, the Authority does not want to oversize programs or facilities, if the 10% goal is achieved. The result could be the

expenditure of additional capital and possible contractual problems, depending on the method of future facility procurement. Again, arriving at a judgment on this issue is most difficult, because it is nearly entirely a matter not locally controlled.

The Counties and now Authority have initiated numerous procurement and purchasing efforts for paper and other products which affect some level of waste reduction. The Authority has a standing two year program of industrial-commercial-institutional waste audits which promote reduction and recycling. These audits will continue and expand.

The Authority will also continue to emphasize reduction in public education efforts, expanding and building on the current program. In the past year, the following direct efforts were undertaken:

- Using the Reduce, Reuse and Recycle theme in newspaper ads;
- Conducting two television interviews specifically on waste reduction – one interview was on suggestions for reducing and reusing gift wrap, and the other was done in December on ways to reduce holiday waste by emphasizing use of natural materials;
- Printing a third edition of Recycling Our Resources: A Recycling/Solid Waste Curriculum for Kindergarten through Sixth Grade. The Solid Waste Authority's elementary school curriculum includes specific classroom activities on: Reuse, composting, and the correlation between purchase of over-packaged goods and excess waste;
- Using the Solid Waste Authority's Waste Not newsletter to promulgate information about waste reduction, composting and reuse of materials. Recent

issues of the newsletter have done this through articles on: Christmas tree recycling, using the Authority's waste audit service to reduce waste and to recycle, and tips on "Recycling the Holiday Spirit" by emphasizing reduction and reuse. Not only does the newsletter reach area opinion leaders such as all county legislators, mayors, town supervisors and council people, but it also is used to supply information to the general public as handouts during presentations and in response to requests for mailed information.

- Continuing to place strong emphasis on these themes during public presentations by staff, especially presentations to school groups which emphasize everyone's role in producing waste and everyone's responsibility for reducing it.

4.1. Recycling Observations

The DGEIS recommended that in order to achieve the highest feasible level of recycling in the two Counties, local governments, institutions, residents and the private sector would be required to undertake certain responsibilities to assure the program's success.

Efforts to recycle the residential waste stream date back 20 years for some communities in the region. More recently, pilot recycling programs were started by Oneida County in a number of communities in 1987. Oneida County appropriated $150,000 for the implementation of municipal pilot programs intended to provide information regarding the feasibility of various recycling collection methods. The Town of Floyd and the Village of Waterville implemented curb-side collection systems. The Town of Verona established a drop-off center for recyclable material collection. At this writing, all 78 communities in both counties have at least one

year of experience with the mandatory separation and recycling of at least newspaper and glass. The Authority received and marketed these recyclables over the past two years marketed approximately 16,000 tons of material.

In order to provide the legal framework for mandatory recycling, Oneida County adopted a local law in August 1988. Herkimer County enacted a similar law in September 1988. The development of both Solid Waste Laws was guided by several basic principles: the counties and all local municipalities should implement a comprehensive and systematic approach to solid waste management; priority should be given to materials recovery of all categories of waste including green waste, construction and demolition debris, infectious waste, household hazardous waste and solid waste; the reduction in locally available disposal capacity is a direct incentive to recycle and thereby, save space; this commitment to recycling is essential in the region's effort to develop an integrated solid waste management system.

Specific implementation schedules were enacted in conjunction with the local laws. Existing solid waste collection practices, recycling programs, contract periods, land use character, population density, distance between collection stops and municipal budget cycles were all considered. All 78 local governments were required to submit plans to the counties to confirm compliance with the implementation schedule. The two Counties are largely beyond the planning stages and into implementation with respect to recycling. The counties have made the financial commitment to construct a materials recovery facility, identified as the Oneida-Herkimer Recycling Center, to insure a means of processing, and therefore, marketing the full range of recyclables. The waste stream in Oneida and Herkimer Counties is composed of a wide range of materials.

several of which are recyclable with an appropriately designed recycling center.

* * *

6.1 Observations

The need for new landfill disposal capacity remains one of the most critical problems facing the region. Even with the very aggressive recycling program underway, a portion of the waste stream will remain. For the foreseeable future, there will be a need for proper landfill disposal capacity.

The most significant policy developed by the Authority, based upon consideration of public comment and all available information, is that the volume of waste sent to a landfill should be as small as possible. There is a growing body of evidence which indicates that modern landfills store, rather than dispose of, waste. Therefore, each unit of waste placed in a landfill triggers a long (perpetual) process of facility maintenance, monitoring, and possibly remediation. This is reflected in the Part 360 Regulations which require a minimum 30 year post closure plan.

Since the issuance of the DGEIS, the clear trend of closure, by the State, of older, unlined landfills has continued. The only facilities remaining open have a defined capacity and life and with one possible exception, none have any prospect for use as a municipal solid waste landfill beyond the closure date noted below:

Ash Landfill - 1994
Whitestown - January 1991
Webb - January 1992
Mohawk Valley sanitary Landfill (MVSL)- Sept-Dec 1991

This trend creates a significant capacity need, at least part of which will need to be met by some new landfill facility.

It is therefore the finding of the Authority that the identification of a new, long-term landfill site is necessary. This will take a minimum of five years to site, permit and construct which will result in the continued reliance on existing landfill sites or areas adjacent thereto over the five year development time.

The DGEIS identified seven top candidate solid waste management facility sites. The DGEIS recommended that a landfill would be the primary use of one of these sites. The suitability of these sites was addressed in the DGEIS as well as supplemental environmental impact statements which reported test results obtained from sub-surface investigations. These sites were generally not found suitable by the Authority pursuant to its siting criteria. Details of the site investigation can be found in the supplemental impact statements.

The findings from these reports, together with public input received during the public comment period, were the basis for the Authority initiating an inquiry to local officials responsible for closed or closing municipal landfills. The officials were asked if they wished to have the Authority explore, on a preliminary basis, the use of such a site coincident with the closure and remediation of the old area. The basic objective would be to effect some environmental improvement and economic efficiency by conducting the clean-up in a coordinated and integrated fashion with the development of new disposal capacity.

These inquiries were sent to the 12 municipalities with public landfills currently operating or operated since 1970. From these inquiries, the German Flatts Ilion Mohawk (GFIM) landfill board responded positively, as did the Southwest

Oneida County (SWOC) landfill. Officials from Rome also informally responded that they were open to such an evaluation but reserved the prerogative for future review. The Village of Boonville asked to be kept apprised of any further interest in using their closed landfill.

Based on this potential interest, the Authority engaged Geraghty and Miller (G&M) to complete a reconnaissance survey of GFIM, SWOC, and Tannery Road. That report is included as Volume 6 Appendix K herein.

All three landfill sites will require additional study and work to provide for the proper closure compliant with Part 360. The Tannery Road and GFIM landfills are both classified as inactive, hazardous waste sites on the New York State Superfund list. As described in the appendix, this designation initiates a complex characterization, remediation and closure process. Typically, several years and several million dollars worth of technical and construction work are required. Therefore, the DEC's position is that no action (i.e. new landfill development) can be taken which might impair remediation of a hazardous waste site.

Although the SWOC landfill does not have the same hazardous waste site designation, remedial investigative work is still being required by the DEC. The same principle - that no action can be taken which might impair the ability to properly remediate the site - applies to SWOC as well.

With respect to the Mohawk Valley sanitary Landfill (MVSL), the findings to date are contained in a publicly presented report, attached as Volume 6 Appendix J. In this report, potential environmental problems were identified including proximity to the aquifer.

The environmental setting and the regulatory status of all three impacted sites very significantly complicates their future use.

While there are complicating factors with each of these sites, any future reuse or new use of one or more of the sites should not be precluded at this tine. The time necessary to develop a landfill facility on a new site will require the continued use of an existing site or sites for an interim period until a new site can be secured though the process outlined in Section 2.8. with the information and understanding available, at this time, the following observations and findings for each site are as follows:

SWOC — The presence and character of the limestone bedrock along with inadequate cover of low permeability soil does not lend itself to the development of any new landfill capacity for municipal solid waste, ash residue, or construction and demolition debris. This site could receive future consideration for a transfer station, satellite green waste compost area, or other similar use depending upon the interest of towns and villages in the area and the final configuration of the overall system of Authority facilities.

GFIM — The report by Geraghty and Miller identified an area at the top (south end) of the GFIM property which may have some potential for future use. This site warrants ongoing re-examination and consideration as the plan is tine tuned and implemented. Like the SWOC site, some non-disposal use may also be warranted.

Tannery Road — The report by Geraghty and Miller indicated some potentially favorable geologic conditions in the vicinity of the existing Ash Landfill. Remedial work has not yet begun on the old City of Rome Landfill. and therefore, it is not currently possible to ascertain if

some portion of the site might be appropriate for future use. Such future use would depend less on geologic factors and more on the nature and distribution of existing waste and the final remediation plan. As with GFIM, the DEC will not permit any activity which would interfere with site remediation. Based on the identification of favorable geologic conditions, the Authority will consider areas proximate to the existing Ash Landfill for potential use. Such use could include municipal solid waste disposal as well as ash residue disposal, composting and construction demolition debris processing and disposal.

Mohawk Valley Sanitary Landfill - The report by Geraghty and Miller identified a number of concerns with the area east of the existing landfill which is proposed by Waste Management Inc. for a new landfill. Due to these area concerns, the Authority does not consider the area adjacent to MVSL as a long-term landfill site. As noted above there is a need to continue utilizing such a site for an interim period until a new, more suitable, long-term site cap be identified and developed.

6.2 General policies

6.2.1

The amount of unprocessed waste sent to a landfill should be as small as possible. Within feasible engineering and economic limits, the landfill cell area should be kept as small as possible.

6.2.2

The development of new landfill disposal capacity within Oneida-Herkimer Counties to serve Oneida and Herkimer counties is of utmost importance. This is a top priority of the

Authority to ensure capacity when needed and to guard against uncontrollable costs of reliance on long distance (out-of-region) transfer.

6.2.3

The Authority will finalize and apply an appropriate siting methodology (see Section 2.8) for the identification of a new landfill site or sites.

6.2.4

The Authority must move to secure interim disposal capacity until a new, long-tern landfill site can be identified and developed. This will be accomplished through an interim disposal contract, reliance on an existing site, or area adjacent thereto, or some combination thereof.

6.2.5

The Authority recognizes that the transition from existing landfills to new landfills is difficult and expensive, but necessary. The Authority further recognizes that a private landfill may be proposed within this region, such as that by Waste Management Incorporated, which would accept waste from outside Oneida and Herkimer counties. It is a principle and policy of the Authority that any new landfill developed for long term capacity, whether or not for local waste and whether public or private, must be sited, constructed and operated consistent with the approach outlined in Section 8.

6.2.6

Information should be given to municipalities with closed or closing landfills to insure that the maximum funds are obtained for remediation and closure.

6.2.7

The Authority will continue to monitor and document the performance of the liner and leachate collection systems at the ash landfill Old Tannery Road to limit potential liability with respect to the remedial work likely to be required relative to the City of Rome landfill.

6.2.8

The Authority is concerned that all solid waste management activities are conducted in a way that protects groundwater resources. The Mohawk Valley aquifer is seen as especially important due to its high potential yield, proximity to population centers of the region, and the possibility that its utilization in the future will increase. The Authority therefore believes that efforts should be made to fully characterize the aquifer and its recharge areas and to protect it from contamination. The Authority will support such efforts through information dissemination and coordination but not in providing engineering, direct technical assistance, or funding.

6.3 Actions

6.3.1

Identify prime hydrogeologic units (areas with the best overburden, bedrock, and groundwater characteristics with respect to the Part 360 regulations).

6.3.2

Finalize draft siting methodology for public comment--1991. (See Sections Siting 2.8 and Public Involvement 2.1).

6.3.3

Assist with the development of a scope of study necessary to fully document conditions at the MVSL new cell area, to insure aquifer protection and define recharge areas. Encourage the United States Geologic Survey (USGS) to evaluate hydrogeologic conditions and with the DEC to insure regulatory compliance.

6.3.4

Complete the negotiations and finalize the interim disposal contract to provide that service until a suitable alternative is in place.

6.3.5

Conduct the study and evaluation necessary to make a determination on the suitability of any areas in close proximity to the existing Ash Landfill, which demonstrate favorable geologic characteristics, and may be usable for some landfill use as outlined herein.

* * *

12.1 Interim Measures

The Authority currently operates three facilities (the Energy Recovery Facility, the Ash Landfill, and the Recycling Center) and numerous programs to manage solid waste in Oneida and Herkimer Counties. The Recycling Center provides for the processing of the full range of recyclables from mixed household waste and some commercial waste for all of the two-county region. The Energy Recovery Facility and Ash Landfill provide service for about one third of the region's population. The ERF

handles mixed municipal solid waste, primarily from households. Plans for the development of additional facilities and programs to provide for all components of the waste stream for all residents of the two counties are explained in the policy section of the Local Solid Waste Management Plan.

There will be an interim period before additional new facilities and programs can be brought on-line to handle the remaining geographic area and categories of the waste stream not presently being handled by Authority facilities. This interim period will vary, depending upon the type of facility and the particular component of the waste stream. The policy section of the local solid waste management plan is organized in 11 sections with specific policies and actions stated for each section. The Authority is committed to the implementation of these policies and actions. Dates for the implementation of each program and facility are indicated on a section by section, action by action basis.

The following is a brief summary of what will happen to the waste stream targeted for the facilities and programs described in these sections from now until those facilities and programs come on line. This, therefore, indicates the interim measures to be employed by the Authority. (The numbers and titles below correspond to those in the policy section of the LSWMP). The interim disposal contract landfill (IDCL) is explained below.

3. Solid Waste Reduction – this waste stream will continue to go to the ERF or IDCL, hopefully on a diminishing basis.

4. Solid Waste Recycling & Reuse – the Authority is continuing its efforts to increase the volume of material separated from the waste stream for recycling at the Recycling Center, private scrap dealers, and other Authority recycling operations.

Residues and materials not separated for recovery will continue to go to the ERF or IDCL.

5. Solid Waste Processing – the waste targeted for possible new waste processing facilities will continue to go to the ERF or IDCL during the interim period. As noted in the policy portion of the LSWMP, a decision in this regard is planned for mid-1992 with a start-up date in the 1995-96 time frame.

6. Residue Disposal – Non-processed and non-recycled waste generated during the interim period will go to the ERF or the IDCL. Ash residues from the ERF will go to the ALF through 1994 at which time either a new cell will be opened, the ash will be directed to the IDCL, or the ERF will be closed thus eliminating the ash residue as a waste stream. As explained below, the IDCL will be used until a new Authority landfill is opened in 1997.

7. Household Hazardous Waste – In 1991 and 1992 special one-day events will be held to collection and disposal of this material. Pending state direction and approval, the Authority will consider a permanent collection facility after 1992. The Authority spent in 1990 over $250,000 on two one-day events. The cost of the one-day program do not support a long-term commitment to such one-day events.

8. Construction and Demolition Debris – For the interim period, this waste will go to either the Guerriero and Humpf sites under Authority direction. The LSWMP outlines the framework for either private sector or Authority C&D waste processing facilities in the 1992-93 time frame. Some waste may be directed to IDCL during the interim.

9. Regulated Medical Waste – for the interim period waste will be directed to the St. Lukes Hospital facility. Capacity has been confirmed.

10. Wastewater Treatment Sludge – the current practices as recorded in the SLWMP are expected to continue through 1994-95 at which time a long range system will be in place. If necessary, some sludge may be directed to the IDCL during the interim.

11. Transfer stations – these will be developed as the main components of the system are put in place.

In summary, the Authority's programs to increase recycling of every component of the waste stream will continue in earnest. At the same time, it is recognized that certain residues and non-recyclable waste will have to be managed for an interim period.

The Authority has committed to the development of a new long-term landfill site to accommodate the non-recyclable portion of the waste stream. In its recently issued outline for the development and implementation of a siting methodology the authority has estimated it will take approximately six years to complete this process. Therefore, for the period of time over the next six years, the Authority has initiated and at this date nearly completed a process to secure interim disposal services.

In February of 1990 the Authority issued an interim disposal request for proposals pursuant to section 120w of general municipal law. That draft solicitation, published nationally, was to provide services either in a landfill located within the region or some other acceptable facility for a period of time until the Authority could get its own facilities developed. In response to the final RFP, two proposals were received in August of 1990.

Objectives

The interim disposal contract request for proposals was issued by the Solid Waste Authority to secure environmentally sound disposal capacity for the region's waste from the present to the time when the Authority's own long term facilities can be brought on line. (This is estimated to be approximately 6 years). The Solid Waste Authority is wholly committed to the development of facilities within Oneida and Herkimer Counties to provide for the region's long term needs. This RFP for landfill disposal service is of critical importance as recycling and other waste processing systems take full effect as is seen as a temporary measure to provide a transition until a full service system can be put in place. During negotiations, the Authority stipulated that no contractual or other measures would in any way retard or restrict the full and complete development of waste reduction and recycling. That means that the Authority will not guarantee that a minimum tonnage of waste will be delivered pursuant to the interim disposal contract.

* * *

JAMES H. DONOVAN
47TH DISTRICT
CHAIRMAN
COMMITTEE ON EDUCATION

THE SENATE
STATE OF NEW YORK
STATE OFFICE BUILDING
UTICA, NEW YORK 13501
315/793-2380

FINANCE
TRANSPORTATION
INSURANCE
MENTAL HYGIENE
STATE-LOCAL RELATIONS

MAR 24 1987

March 19, 1987

Mr. Hans G. Arnold
Commissioner
Department of Solid Waste Management
Oneida County Office Building
800 Park Avenue
Utica, New York 13501

Dear Mr. Arnold/Hans:

Please find enclosed information I thought might be of interest to you.

Sincerely,

/s/

Michael R. Houseknecht
Staff Assistant

MRH/as
Enclosure

BEST AVAILABLE COPY

THE SENATE
STATE OF NEW YORK
ALBANY

MAR 10 1987

MEMORANDUM

MEMORANDUM

TO: Majority Senators

FROM: Joseph L. Bruno, Vice Chairman
Solid Waste Commission

RE: Local "flow control" legislation granting localities authority over the flow of solid waste within their jurisdictions

DATE: March 9, 1987

As a response to New York's well-documented solid waste disposal crisis, local governments across the state are upgrading their solid waste management systems and proposing new facilities to replace capacity lost due to the need to close existing landfills. Many are considering resource recovery facilities as an integral part of their future solid waste management program. These communities will, in turn, be looking to the legislature for specific authority to enact local "flow control" ordinances, which provide a local government with the right to control the disposition of waste within its boundaries. This memo is intended to provide background information on various approaches flow control legislation has taken, and to point out some factors you might wish to consider when local governments in your district request similar legislation.

A flow control ordinance enables a municipality or solid waste authority to control the solid waste generated by or sent into its jurisdiction through directing it to a specified solid waste management facility — in most instances, a resource recovery facility. This is necessary in order for the

municipality to assure that sufficient waste is received at a resource recovery facility to:

(1) cover financing costs;

(2) meet the terms of a "put or pay" contract, under which a financial penalty is incurred if a minimum amount of waste is not received at the facility; and

(3) ensure that energy sales contracted for with other parties can be fulfilled.

For these reasons, bond counsel will insist on flow control authority prior to approving bonds for a specific facility. In addition, specific statutory authority will clarify that municipalities are acting in accordance with a clearly articulated state policy and may thus claim the protection of the state action exemption to the federal antitrust laws.

Recent flow control authorizations have included protection for recycling interests. This is to assure consistency with federal requirements, specifically, Section 4003 of the Resource Conservation and Recovery Act (RCRA). The 1984 amendments to RCRA specify that laws granting local control over the flow of solid waste must not interfere with "present and reasonably anticipated future needs of recycling interests." Further, the federal law implies that adequate provision must be given to these needs when sizing a resource recovery facility.

While there has been some dispute over the actual effect of the federal language on local programs, there is some merit associated with these provisions. Specifically, they protect various industries that may provide important economic contributions (e.g., paper mills); and, they establish a "pro-recycling" approach to solid waste management. Conversely, opposing inclusion of such language presents an *image* of opposing recycling activities, regardless of the underlying rationale.

During the 1985 and 1986 Sessions, the Legislation Commission on Solid Waste Management (LCSWM) attempted to develop generic legislation that would be used for all future flow control bills. Due to differences of opinion over the impact and need for various sections, agreement was not reached on the proposals. However, Assemblyman Hinchey, LCSWM Chairman, had an agreement from Assembly Leadership last year, which I fully anticipate will continue this year, that no flow control bill would pass the Assembly without language protecting recycling interests. Thus, from a practical viewpoint, language affording protection is necessary.

It should be noted here that, when discussing alternative approaches to language providing recycling protection, it is important to keep in mind the frame of reference. Specifically, the level of concern over the degree of protection provided recycling interests over the quantity needs of a resource recovery facility depends on the demographics of the area over which flow control is requested. In a large metropolitan area, where there is a virtually unlimited future supply of solid waste, bond counsels are generally not concerned over strong recycling protection language because there is virtually no likelihood that any level of future recycling activities will remove a sufficient tonnage from the waste stream to threaten a plant's viability. This is particularly true in the New York City and Long Island area. However, in more rural environments with limited future supplies of solid waste strong recycling protection language could potentially prove troublesome. This would be particularly true in cases where any level of future recycling were protected, thereby allowing an unforeseeable quantity to be removed at a future point from the waste stream. Once this amount went beyond that anticipated at the time the plant was designed, the penalty provisions of a put or pay contract could take effect.

The language the Assembly originally insisted on was:

> "Such local law, ordinance, or regulation shall provide, however, that the county, city, town or village will not act in a manner, or enter into any contract, that can be construed as interfering or having the effect of interfering with the implementation of on-going or proposed or reasonably anticipated future source separation, recycling programs, changes to the packaging portion of the waste stream to reduce solid waste generation, and the activities and enterprises of scrap dealers, processors and consumers, and shall also provide for the maximum opportunity for the reclamation and recovery of materials." [emphasis added]

Problems relating to the first underlined section stemmed from the uncertainty of determining what is meant by the phrase "reasonably anticipated future" needs of recycling interests. This was addressed in the Senate version of last year's generic flow control law (S.6599-D) through language that (1) has DEC certify that a municipality has met the requirement to not interfere with recycling; and (2) stipulates that "once a determination has been made that a municipality has properly allowed for such ongoing, or proposed, or reasonably anticipated future solid waste volume reduction programs . . . a municipality shall not be required to accommodate additional volume reduction programs that were not anticipated unless the department finds that such additional volume reduction program would not cause such municipality to suffer a financial loss . . ."

The second underlined language ("shall also provide for the maximum opportunity . . .") presented problems because its intent is redundant so far as protecting recycling activities is concerned, and it appeared to take away the protection offered by the clarification to the first section. Bond counsel

with whom my staff has consulted in developing local legislation have insisted on the removal of this language.

The Assembly has since pursued an alternate approach, which Assemblyman Hinchey used in his Ulster County Resource Recovery Agency bill. This approach does not specifically have language protecting recycling interests; rather, in the section allowing local control over the flow of solid waste, the bill specifies that the term "solid waste" shall *not* include "any scrap or other material of value separated from the waste stream and held for purposes of materials recycling." This approach does not provide *any* protection as far as guaranteeing a minimum flow of waste to a facility in the future, since any amount of materials may be removed at any time in the future so long as it is recycled. While this does not pose a problem in large metropolitan areas, it could present significant difficulties in areas where smaller amounts are generated.

Further, while some bond counsels have reacted favorably to this recent approach to recycling protection language, it should be noted that the burden for meeting conditions in a put or pay contract will fall on the local government that is party to the agreement. Accordingly, county attorneys and other involved officials should carefully review the implications.

My staff is continuing to pursue these issues. I bring these matters to your attention to highlight issues you might wish to keep in mind in the event that your office is developing legislation to meet local flow control needs. As always, I and my staff would be more than happy to answer any questions you might have on this or other solid waste management issues.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY

STATEMENTS OF INCOME AND ACCUMULATED DEFICIT
Years Ended December 31

	2001		2000
OPERATING REVENUES			
Tipping fees	$ 16,322,014		$ 16,071,793
Contract/user fee – City of Utica (Note J3)	1,781,603		1,838,919
Blue bag sales (Note J3)	1,217,360		1,193,040
Recyclable sales	1,225,127		1,574,506
Miscellaneous	397,743		334,891
	20,943,847		21,013,149
OPERATING EXPENSES			
Landfill tipping fees	11,367,090		11,029,788
Personal services	2,401,303		2,211,612
Contractual services	1,768,965		1,888,190
Materials and supplies	325,098		386,835
Utilities	283,040		247,899
Repairs and maintenance	69,742		83,806
Insurance	112,871		111,399
Other rental	58,574		108,394
Depreciation (Note A5)	1,289,680		1,216,241
Miscellaneous	718,620		631,471
	18,394,983		17,915,635
Operating income	2,548,864		3,097,514
NONOPERATING REVENUES (EXPENSE)			
Interest income	753,489		853,990
Interest expense	(2,308,384)		(2,424,449)
Amortization of bond issuance costs	(246,437)		(252,615)
Operating grants	175,192		91,010
	(1,626,140)		(1,732,064)
Net income	**922,724**		**1,365,450**
ACCUMULATED DEFICIT, beginning of year	(11,522,653)		(12,888,103)
ACCUMULATED DEFICIT, end of year	**$ (10,599,929)**		**$(11,522,653)**

The accompanying Notes to Financial Statement are an integral part of these statements.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY

NOTES TO FINANCIAL STATEMENTS
December 31, 2001 and 2000

NOTE A -- SUMMARY OF ACCOUNTING POLICIES

1. Organization

The Oneida-Herkimer Solid Waste Management Authority (Authority) was created September 1, 1988, as a public benefit corporation under New York State Public Authorities Law §2041, Title 13-AA Chapter 747 of the Laws of 1987 by the New York State Legislature with powers to construct, operate, and maintain solid waste management facilities for the benefit of Oneida and Herkimer Counties (the Counties). As of December 31, 2001, the Authority owns eight facilities, the Western Transfer Station (WTS), the Eastern Transfer Station (ETS), Materials Recovery Facility (MRF), Ash Landfill (ALF) (closed during 1998), Green Waste Compost Site (GWC), Household Hazardous Waste Facility (HHW), the Webb Transfer Station, and the Stump Disposal Facility.

* * *

SOLID WASTE TRANSPORTING AND DISPOSAL AGREEMENT

THIS SOLID WASTE TRANSPORTING AND DISPOSAL AGREEMENT (the "Agreement") made and entered into as of the 30th day of November, 1998, by and between High Acres Landfill and Recycling Facility, a division of Waste Management of New York, L.L.C., a Delaware Corporation, with the division office situate at 425 Perinton Parkway, Fairport, New York 14450, and the corporation office situate at 101 Ontario Street, East Rochester, New York 14445 (the "Contractor"), and the Oneida-Herkimer Solid Waste Management Authority, with its office situate at 1600 Genesee Street, Utica, New York 13502 (the "Authority").

RECITALS:

WHEREAS, the Authority is authorized by Section 2049-ee of the Oneida-Herkimer Solid Waste Management Authority Act, New York Public Authorities Law, Article VIII, Title thirteen-FF (1987) (the "Act") to collect, receive, extract, transport, dispose of, sell, store, convey, recycle, and deal with in any lawful manner and way, solid waste and any products or by-products thereof, on such terms and in such manner as the Authority may deem proper; and

WHEREAS, the Authority is enabled by the Act and by Agreement with the County of Oneida and the County of Herkimer to designate by lawful procedure the site or sites for disposal of solid waste generated within the two Counties; and

WHEREAS, the Authority and the Contractor desire to enter into an agreement whereby the Contractor will receive at the Authority Eastern Transfer Station, Albert Schuler Memorial Highway, Utica, New York and at the Authority Western Transfer Station, Route 365, Rome, New York, (the "Transfer Stations") non-recyclable solid waste generated

within Oneida County and Herkimer County and the Contractor will transport such non-recyclable solid waste to its disposal facility known as the High Acres Landfill at Fairport, New York or such other Authority approved solid waste disposal facility, and the Contractor will dispose of such non-recyclable solid waste at its High Acres Landfill or such other Authority approved solid waste disposal facility which is authorized and legally permitted to operate under all applicable federal, state and local laws; and

WHEREAS, the Authority has agreed to pay the Contractor for such transportation and disposal services in accordance with the terms of this Agreement;

NOW, THEREFORE, in consideration of the premises and of the mutual obligations undertaken herein, the Contractor and the Authority agree as follows:

ARTICLE I - DEFINITIONS

Section 1.01 Definitions. For purposes of this Agreement, the following words and phrases shall be given the respective interpretations and meanings set forth below.

"Agreement Date" means November 30, 1998.

"Alternate Landfill" means any duly licensed or permitted solid waste disposal facility, other than the High Acres Landfill and Recycling Facility at Fairport, New York, owned and operated by the Contractor or its affiliated company, and approved by the Authority, upon a written request by the Contractor. Such request by the Contractor shall be made only in the event of conditions caused by uncontrollable circumstances as defined herein.

"Authority Hauler(s)" means any Person permitted by the Authority to deliver solid waste to the Authority's Transfer Stations.

"Authority Transfer Stations" means the Eastern Transfer Station owned by the Authority and located on Albert

Schuler Memorial Highway, Utica, New York and the Western Transfer Station owned by the Authority and located on New York State Route 365, Rome, New York.

"Authority Uniform Tracking Document" means a document prepared by the Authority, completed by. the generator, and delivered to the. Contractor with the applicable load of solid waste (with copies for the waste generator and the solid waste disposal facility) which provides a verifiable record of, but not limited to, waste profile/type, waste generator, county of origin, non-hazardous certification, waste hauler, waste disposal facility and corresponding dates of shipment and receipt.

"Billing Period" means each calendar month in each. Billing Year.

"Billing Year" means each twelve month period commencing on December 2nd of each succeeding year during the term of this Agreement; provided, however, that the first Billing Year shall commence on the first day of the first month following, the Commencement Date.

"Business Day" means each Monday, Tuesday, Wednesday, Thursday, Friday, and Saturday which is not a Legal Holiday.

"Change in Law" means either (a) the enactment, adoption, promulgation, modification or repeal, after the Commencement Date of this Agreement, of any Federal or State law or regulation, County or other local law or, ordinance, code, rule or regulation, Authority action, rule or regulation, or other legislation or regulation which establishes requirements affecting the collection, processing, transporting and/or disposal of solid waste which are more burdensome than the most stringent requirements in effect in the State of New York on the Commencement Date for this Agreement, or (b) the imposition, after the Commencement Date for this Agreement, of any conditions in the issuance or

renewal of any official permit, license or approval necessary for operation of the Authority's two transfer stations or the Contractor's solid waste disposal facility(ies) or with respect to the disposal of Authority waste, which are more burdensome than the most stringent requirements in effect on the contract date. In no event shall a change in federal, state or local tax law be considered a change in law.

"Commencement Date" means the date December 2, 1998.

"Contractor" means Waste Management of New York, L.L.C., with its corporate office at 101 Ontario Street, East Rochester, New York, 14445 and its High Acres Landfill and Recycling Facility division office situate at 425 Perinton Parkway, Fairport, New York 14450.

"Contractor Fault" means the unexcused nonperformance or malperformance by the Contractor or the negligent or willful act or omission of an agent or employee of the Contractor under this Agreement.

"Counties" means the County of Oneida and the County of Herkimer, in the State of New York.

"DEC" means the New York State Department of Environmental Conservation and/or its successor.

"Event of Default" means a failure of either party to this contract to perform any term or condition of this contract on its part to be performed.

"Disposal Facility" means the High Acres Landfill or other permitted solid waste disposal facility owned and operated by the Contractor or its affiliated company, approved by the Authority, and meeting all the terms and conditions herein.

"Hazardous Waste" means any material, substance or waste which, as of the Agreement Date and by reason of its composition or characteristic, is (a) toxic or hazardous

substance or material as defined in the Solid Waste Disposal Act, 42 U.S.C. §§6901 et seq., section 6(e) of the Toxic Substances Control Act, 15 U.S.C. §2605(e) or the New York Environmental Conservation Law, §27-0701-0703 (McKinney 1984), as any such provisions are replaced or amended, and regulations promulgated and finalized thereunder or (b) special nuclear material, source material, or by-product material within the Atomic Energy Act of 1954, as amended. If any governmental agency or unit now or hereafter having appropriate jurisdiction shall identify as hazardous waste a material, substance or waste which was not, as of the Agreement Date, identified as a hazardous waste, then such material, substance or waste shall be considered a hazardous waste for purposes of this Agreement as of the effective date of any such determination.

"Infectious Waste" means the definition contained in New York State Public Health Law 1389 AA-GG.

"Legal Holiday" means New Year's, Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day.

"Party" or "Parties" means either or both the Contractor or the Authority, as the context appears.

"Person" means any individual, corporation, partnership, joint venture, association, joint-stock company, trust, unincorporated organization, or government or any agency or political subdivision thereof.

"Residual Waste" means any material which meets the definition of "Solid Waste" herein but which, due to either its characteristics or handling requirements, is designated by the Authority or Contractor as better managed separate and segregated from other solid waste and which, therefore, will not be delivered to one of the Authority Transfer stations, but may be delivered to the Disposal Facility directly from the point of generation.

"Residue" means the material which remains after solid waste is incinerated.

"Scale" means the Authority's scales located at its two transfer stations.

"Schedule" means any exhibit or schedule attached hereto and incorporated in this Agreement, unless otherwise expressly indicated by the terms of this Agreement.

"Section" means a section of this Agreement.

"Service Fee" means the cost per ton payable by the Authority to the Contractor for the transporting and disposal of solid waste received at the two Authority Transfer Stations.

"Solid Waste" has the meaning specified in 6 NYCRR Part 360 as amended or replaced; in addition, it means all nonrecyclable solid waste (less unacceptable waste) received at the Transfer Stations, inspected by the Authority, sorted as required by this Agreement and/or where appropriate, and loaded onto transfer trailers to be transported by the Contractor to the Disposal Facility.

"State" means the State of New York and all of its appropriate administrative, contracting and regulatory agencies and offices.

"Ton" meaning two thousand (2,000) pounds.

"Unacceptable Waste" means hazardous waste, and radioactive materials, and such other material, substance or waste identified by a governmental agency or unit as hazardous waste, or identified as unacceptable for disposal in a New York State permitted landfill under Federal or State Law, Rule or Regulation.

"Uncontrollable Circumstance" means any act, event or condition, other than a labor strike, that has had, or may reasonably be expected to have, a direct material adverse

effect on the rights or the obligations of a Party under this Agreement, or a direct material adverse effect on the operation of the Transfer Stations and the Disposal Facility or on the delivery of solid waste to the Disposal Facility, if such act, event or condition is beyond the reasonable control of the Party relying thereon as justification for not performing an Obligation or complying with any condition required of such Party under this Agreement. Such acts or events shall include, but shall not be limited to, the following:

(a) an act of God (except normal weather conditions for the geographic area of the Facility), hurricanes, tornados, epidemic, landslide, lightning, earthquake, flood, fire or explosion or similar occurrence; or an act of the public enemy, war, blockade, insurrection, riot, general unrest, or restraint of government and people, civil disturbance or similar occurrence;

(b) the order, or injunction and/or judgment of any federal, state or local court, administrative agency or governmental body with jurisdiction over the performance of either Party's obligations under this Agreement; excepting decisions interpreting federal, state and local tax laws; provided that such order or judgment shall not be the result of the negligent or willful action or inaction of the Party relying thereon, and neither the contesting in good faith of any such order or judgment nor the failure to so contest such order or judgment shall be construed as a willful or negligent action or inaction of such Party; and

(c) a Change in Law.

(d) suspension, termination or interruption of utilities, water and sewer lines and power transmission lines to the Transfer Stations or the Disposal Facility (for reasons other than Contractor Fault) which are required for and essential to the operation of the such facilities.

"Week" means a period commencing Sunday at 12:01 a.m. and ending on midnight of the following Saturday.

* * *

ARTICLE III - DELIVERY AND DISPOSAL OF SOLID WASTE

Section 3.01 Overall Responsibilities.

(a) The Contractor shall accept, receive, transport and dispose of all solid waste generated in Oneida County and Herkimer County, delivered to the Transfer Stations and loaded by the Authority into Contractor's or its sub-contractor's transfer trailers; and the Contractor shall also accept any Residual Waste, Construction and Demolition Debris and Contaminated Soil coordinated through the Authority and delivered directly from the point of generation in Oneida County and Herkimer County to the Disposal Facility.

(b) Contractor shall not knowingly accept, receive and dispose of any solid waste generated in Oneida County and Herkimer County that is not delivered directly through the Transfer Stations to the Disposal Facility, except for Residual Waste, Contaminated Soil, and Construction and Demolition Debris coordinated through the Authority.

(c) Contractor shall provide all necessary tractors and transfer trailers to receive at the Transfer Stations and transport such solid waste to the Disposal Facility.

(d) Contractor shall unload the transfer trailers at the Disposal Facility and properly dispose of such solid waste in conformance with all applicable regulations and accepted operating practice.

(e) The Contractor shall obtain and maintain all necessary licenses and permits in order to enable it to

perform its obligations under subsection (a) of this Section 3.01 and elsewhere in this Agreement.

Section 3.02 Commencement Date; Notice of Site Change; Receiving Time.

(a) Provided that the conditions precedent set forth in Article II have been met, the Commencement Date shall be 12/2/98. If the conditions precedent are not met on or before such date, and the Authority elects to extend the date by which the conditions precedent must be met pursuant to Article II, the Commencement Date shall be the 14th day (unless such 14th day is not a Business Day in which case the applicable day shall be the first Business Day following such 14th day) following the date on which the conditions precedent are met.

Section 3.03 Weighing of Solid Waste; Weigh Scale Records.

(a) The Authority shall operate and maintain weigh scales located at the Transfer Stations, and the weigh scale records for the purposes of determining the total tons of solid waste loaded on transfer trailers leaving the Transfer Stations, and for all billing.

(b) Disputes with respect to the occurrence of weigh scale records shall be resolved pursuant to the provisions of Article VIII.

Section 3.04 Authorized Rejections.

a) the Authority shall have the obligation to reject deliveries of Unacceptable Waste received at the Transfer Stations by or on behalf of the Authority.

(b) the Contractor shall have the right to reject deliveries of Unacceptable Waste at the Transfer Stations or at its Disposal Facility.

Section 3.05 Unauthorized Rejections.

(a) If the Contractor rejects solid waste delivered to the Transfer Stations and/or at the Disposal Facility for any reason other than those set forth in Section 3.04, the Authority shall not be required to pay the Service Fee to the Contractor with respect to such solid waste; and the Contractor shall be obligated to pay the Authority for direct and reasonable costs incurred by the Authority, to the extent of cost substantiation, for the total of the transportation and waste disposal charges per ton incurred by the Authority which are in excess of the waste disposal fee portion of the Service Fee for each such ton if the rejection occurs at the Disposal Facility.

Section 3.06 Authority Approved Disposal Facility. The Contractor shall request approval from the Authority for any alternate Disposal Facility. It is hereby recognized and agreed by the Authority and by the Contractor that the Contractor may utilize the Alliance Sanitary Landfill in Taylor, Pennsylvania for disposal of waste from the Transfer Stations. There shall be no addition to the service fees herein. Any further requests shall be made only in situations arising from uncontrollable circumstances. In such instance, the Authority shall be obligated to pay the Contractor the Service Fee only, even if the Contractor incurs additional costs.

ARTICLE IV - SERVICE FEE

Section 4.01 Service Fee.

(a) Collection. On and after the Commencement Date and for the term of this Agreement, the Authority shall pay the Service Fee to the Contractor on a monthly basis and within thirty (30) days upon receipt by the Authority of the Contractor's invoice.

The Contractor shall provide the Authority with a statement together with each payment request (invoice) pertinent to such Billing Period. The statement shall set forth the number of tons of solid waste loaded on transfer trailers

at the Transfer Stations and delivered to the Disposal Facility and the Service Fee due the Contractor based on the weights recorded at the Authority's scales. The statement shall also include a copy of all Tracking Documents and the weigh scale records for such Billing Period.

(b) The Service fee shall be per ton of solid waste received by the Contractor at the Transfer Stations and shall include transport and disposal of such solid waste to the Disposal Facility.

(c) Service Fee Schedule

	1999	2000	2001	2002
Solid Waste	$43.50	$43.50	$46.00	$47.00

Note: The two categories below are for wastes delivered directly to the High Acres Landfill. The Service Fees do not include transportation; the Service Fees are for disposal only.

	1999	2000	2001	2002
Residual Waste	$35.00	$35.00	TBD	TBD
Construction & Demo. Debris	$30.00	$30.00	TBD	TBD
Contaminated Soil	$25.00	$25.00	TBD	TBD

ARTICLE V - OPERATION OF TRANSFER STATIONS

Section 5.01 Transfer Station Operations

(a) Discharge and Inspection of Waste. After receiving waste at the Transfer Stations, the Authority shall inspect and remove Unacceptable Waste on the tipping floor, sort the solid waste where appropriate, and load the solid waste onto the Contractor's transfer trailers at the Transfer Stations.

Unacceptable Waste shall be reloaded onto the collection vehicle which deposited such material on the tipping floor.

(b) Loading of Waste. The Authority shall gather the solid waste from the tipping floor of the Transfer Stations and load it into the Contractor's transfer trailers in minimum loads of 19 tons per trailer (as averaged on a quarterly basis) for shipment to the Disposal Facility; transfer trailers shall be fully tarped before departure to the Disposal Facility.

(c) Weighing of Transfer Trailers. The Authority shall cause each loaded transfer trailer to be weighed on New York State certified scales located adjacent to the Transfer Stations before departure from the Transfer Stations, to determine the tonnage of waste delivered to Contractor at the Transfer Stations and disposed at the Disposal Facility. Billing will be based on Authority scale records maintained at the Transfer Stations.

(d) Staging Area. The Authority shall provide to Contractor reasonably sufficient staging areas at the Transfer Stations to allow for temporary parking of tractors and transfer trailers as necessary for Contractor's performance under this Agreement prior to departure to the Disposal Facility and after their return to the Transfer Stations.

(e) Transport of Trailers. Contractor will transport or cause its Authority approved sub-contractor to transport all loaded transfer trailers to the Disposal Facility and Contractor will return or provide for the return of the transfer trailers to the Transfer Stations for staging and reloading of solid waste.

(f) Equipment. The Contractor shall procure and maintain at its expense all necessary equipment to transport the solid waste to the Disposal Facility, and to dispose of the solid waste at the Disposal Facility. Based on the Contractor's knowledge of the Authority system and the Contractor's knowledge of the volumes of waste received at

the Transfer Stations, and based upon ongoing coordination with the Authority staff, the Contractor shall at all times maintain and have available adequate numbers of tractors and transfer trailers to receive and remove daily all solid waste delivered to the Transfer Stations. This shall include an adequate number of stand-by transfer trailers to insure: (1) continuous loading during regular hours of operation, (2) removing all waste from the transfer stations by the end of the regular operating day, (3) ability to meet daily and seasonal fluctuations in waste volume. All equipment provided by the Contractor shall be Used and operated by the Contractor in accordance with safe, accepted, and standard practice.

(g) Hours of Operation. Current hours of operation for the Eastern Transfer Station are 5 a.m. - 4 p.m. M-F, 7 a.m. - 8 a.m. Saturday, and for the Western Transfer Station the hours of operation are 8 a.m. - 4 p.m. M-F, and 8 a.m. to 12 p.m. Saturday. The Authority reserves the right to make adjustments to these hours of operation as necessary, with the prior written consent of the Contractor, which shall not be unreasonably withheld. The Contractor and its sub-contractor shall have the right to enter the Transfer Stations' staging areas prior to and after the aforesaid operating hours as necessary for the return and pick-up of empty arid loaded transfer trailers, and the Authority shall provide such access as necessary.

(h) Utilities. Electricity, gas and water used at the Transfer Stations shall continue to be separately metered and billed in the name of the Authority who shall be responsible for the payment of all invoices for these services.

Section 5.02 Use of the Transfer Stations

(a) The Authority shall keep the Transfer Stations open for receiving solid waste during the hours of operation, excluding legal holidays. Subject to applicable state

regulations and/or conditions contained in any permit issued thereunder, or conditions contained in any labor agreement, the Authority may receive such solid waste at the Transfer Stations at additional times and in such cases the Authority will notify the Contractor in advance.

(b) Contractor may use the Transfer Stations for the performance of its respective services under this Agreement but only for such services. If not previously terminated under Article IX of this Agreement, Contractor's use of the Transfer Stations shall terminate at the end of the term of this Agreement or any extension thereof.

(c) Title to the Transfer Stations shall remain in the name of the Authority.

(d) Contractor shall not encumber the Transfer Stations with any liens and encumbrances and, except as otherwise authorized by this Agreement, Contractor shall not remove or damage any part of the physical structure of the Transfer Stations, or permit the use of the Transfer Stations or any part thereof by others, except as may be authorized by the Authority.

(e) Contractor shall not construct or install any capital improvement or make any structural alterations in the Transfer Stations without the advance written approval of the Authority. Capital improvements or structural alterations as used herein means any alteration or improvement to the structure of the building or the surrounding real property that, after completion, cannot be removed without substantial loss of value or major damage to the premises.

(f) The Contractor shall, at all times, have access to the Transfer Stations for the performance of Contractor functions on a non-interference basis.

Section 5.03 Maintenance of Transfer Stations

(a) The Authority shall maintain the Transfer Stations, the scales and the operating permit in a manner to fulfill its obligations under this Agreement.

(b) The Contractor shall utilize the Transfer Stations in a manner so as to cause no damage or degradation to the facilities and the Authority and the Contractor shall on a daily basis return the areas of the transfer stations used by the Authority and the Contractor to a clean and usable condition.

(c) The Authority shall be responsible for snow and ice removal, facility and scale operating conditions, grounds maintenance, mud and dust control and removal of litter outside the Transfer Stations.

(d) The Authority shall be responsible for payment of leachate disposal costs at the two transfer stations.

Section 5.04 Operation of Transfer Stations by Contractor

Contractor shall assume all tipping floor and trailer loading operations at the Transfer Stations, upon ninety (90) days written notice from the Authority. Contractor shall provide its own equipment and labor in the performance of such operations. The Authority shall pay Contractor for its performing such operations at the rate of Two Dollars ($2.00) per ton of solid waste loaded into the transfer trailers at the Transfer Stations; in the event, however, the solid waste loaded into the transfer trailers at the Transfer Stations during the first and successive twelve (12) month annual period after the Contractor's assumption of such operations shall be less than 150,000 tons, then the authority and Contractor shall agree on a fair increase in the rate per ton charged over such and such subsequent twelve (12) month period to fairly compensate Contractor for its assumption of such operations.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

EXPERT REPORT OF MARK P. BERKMAN

I. Introduction

1. I am an economist and Vice President at Charles River Associates (CRA), a firm of consulting economists located in Oakland, California. I earned my bachelor of arts degree in urban affairs and economics from George Washington University in 1975, a Masters degree in urban planning and policy analysis from Harvard University in 1977, and a Ph.D. in public policy analysis from the University of Pennsylvania's Wharton School in 1991. Before joining CRA in 2002, I was employed by National Economic Research Associates (NERA). At NERA, I served as vice president from 1993 to 2002, a senior consultant from 1987 to 1993 and as senior analyst from 1983 to 1987. Before joining NERA in 1983, I served as a budget and policy analyst at the Congressional Budget Office (1977-1980) and as a research fellow at the University of Pennsylvania (1980-1983). I am a member of the American Economic Association, the Association for Public Policy Analysis and Management, the Association of Environmental and Resource Economists and the Western Economic Association.

2. During the course of my career, I have frequently studied solid waste management issues, including disposal capacity, market definition, pricing, environmental and economic impacts, and the

impacts of flow control. My clients in these matters have included public agencies such as the New York City Sanitation Department, the Oregon Department of Environmental Quality, the Alameda County (California) Solid Waste Management Authority, the Solano County (California) Department of Environmental Management, and the Maryland Attorney General's Office. I also have conducted studies and testified on behalf of private sector clients in the solid waste industry, including American Waste, Browning Ferris Industries, Landfill & Resource Recovery Inc, Superior Waste, Norcal, and Randy's Sanitation.

3. CRA charges clients $400 per hour for my services. A copy of my *vita* is attached as Exhibit 1.

II. Purpose and Summary of Opinion

4. I was asked by Plaintiffs' counsel to opine on the application of the *Pike* balancing test, set out by Justice Stewart in *Pike v. Bruce Church Inc.*, 397 U.S. 137, 90 S.Ct. 844 (1970), to the solid waste flow control laws enacted by Oneida County and Herkimer County, New York.

5. The balancing test was explained by Justice Stewart, at 397 U.S. 142, 90 S. Ct. 847, as follows:

> Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden on commerce is clearly excessive in relation to the putative local benefits. . . If a legitimate public purpose is

found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and whether it could be promoted as well with a lesser impact on interstate activities.

6. Applying the *Pike* test requires that I address the following questions:

   - Do the Oneida County and Herkimer County local solid waste flow control laws adversely affect interstate commerce?
   - What was the public purpose behind and what local benefits actually result from the Counties' solid waste flow control laws?
   - Is the resulting burden on interstate commerce clearly excessive in relation to the local benefits?

   In brief, I have determined in my professional opinion that the local flow control laws of Oneida and Herkimer County have an adverse effect on interstate commerce. Further, I have concluded that the sole purpose for and benefit derived from the Counties' local solid waste flow control laws is financial, and that the actual local benefits can be achieved by alternative means that impose little, if any, burden on interstate commerce.

7. I provide detailed support for these conclusions below. First, I present a brief history of the local flow control laws enacted by Oneida and Herkimer Counties. Second, I review the impacts the local solid waste flow control laws have and will have on interstate commerce. Third, I discuss the common justifications for flow control. Fourth, I review the purposes behind and the resulting benefits from the Counties' flow control laws in the context of these

common justifications. Fifth, I review the local benefits that the Counties contend justify the local flow control laws. Sixth, I review the alternatives available to the Counties. Finally, I provide a list of the materials that I considered in forming my opinions.

III. A Brief History of Oneida and Herkimer Counties' Local Flow Control Laws

8. "Flow control" – in this instance, a statutory mandate that haulers transport solid waste to County designated facilities only – was initiated in Oneida County, New York, on August 8, 1988 per Oneida County Local Law No. 1 of 1988.[1] The documents I reviewed indicate that the flow control provision was inserted into the original draft of the proposed Local Law, which focused on the issue of recycling, at the suggestion of the Commissioner of the Oneida County Department of Solid Waste Management. The Commissioner had previously been advised and informed of the critical role "flow control" in the bonding of costs associated with large capital solid waste project expenditures.[2]

9. Herkimer County, New York followed suit and enacted a combined recycling/flow control law in September 1988.

10. The Oneida-Herkimer Solid Waste Management Authority was created on September 1, 1988. The

---

1 Affidavit of Robert F. Julian, Ex. J-11 (July 5, 1995).

2 Julian Affidavit, ¶¶ 45-48; Ltr. from H. Arnold to R. Julian, February 10, 1988; Memorandum from Joseph L. Bruno, State Senator and Vice Chairman, Solid Waste Commission to Majority Senators, March 9, 1987 attached to ltr from M. Houseknecht to H. Arnold, March 19, 1987; Barton & Loguidice, P.C., "Solid Waste Management: Eastern Oneida and Herkimer Counties. Final Draft Report, Long Range Alternatives" June 1986.

enabling legislation granted the Authority the power "to collect, receive, extract, transport, process, dispose of, sell, store, convey, recycle, and deal with, in any lawful manner and way, solid waste generated within the area of operation in any products or by-products thereof." N.Y. Public Authorities Law, §2049-ee(4). The enabling legislation also granted "to the counties and all other municipalities within the area of operation [of the Authority] . . . the power to adopt and amend local laws . . . requiring that all solid waste generated, originated or brought within their respective boundaries be delivered to a specified solid waste management-resource recovery facility." N.Y. Public Authorities Law, § 2049-tt(3).

11. The Oneida-Herkimer Solid Waste Management Authority Act (the "Act") was the result of a joint request by Oneida and Herkimer Counties. Similar to Oneida County Local Law No. 1 of 1988, the Act, which primarily focuses on "the proper management of solid waste . . . necessary to protect public health and the environment," originated as two separate and distinct proposals. The first proposal concerned the creation of a solid waste management authority; the second proposal was a request for authorization to enact flow control legislation,[3] an anticipated bond counsel requirement, and to address potential concerns over federal antitrust laws.[4]

12. Subsequent to September 1, 1988, the proponents of the Act acknowledged that "a specific objective was to alleviate the County tax burden"[5] and that "[t]he

---

3 Ltr. from R. Julian to Senator Hoffman, November 1, 1987.

4 Memorandum from Joseph L. Bruno to Majority Senators, March 9, 1987.

5 H. Arnold memorandum to Oneida County Executive and R. Julian, January 4, 1989.

ability to finance and then operate [the Authority] facilities depends upon the legal commitment of the [Counties'] waste."[6] The financial component was also emphasized by State Senator Donovan, in his March 3, 1988 memorandum of support, which stated that "capital expense and its potential impact on the constitutional debt limit support the creation of an authority."

13. Following the creation of the Authority, the Counties rescinded the local laws of 1988 and replaced them with the modified and amended versions of the law that are the subject of the pending litigation,[7] namely: Oneida County Local Law No. 1 of 1990 and Herkimer County Local Law No. 1 of 1990 (the "Flow Control Laws"). The Counties contracted with the Authority for the management of all solid waste and recyclables and in turn agreed to direct and/or deliver all solid waste and the majority of recyclables that originate in the Counties to the Authority. The Counties also leased and/or sold all their existing solid waste management facilities under construction to the Authority.

14. The Authority assumed the existing debt of the solid waste management facilities leased and/or purchased from the Counties, aggressively pursued a two-county recycling program, commenced the on-going process of permitting a new solid waste landfill in 1991, and executed contracts for the sale of recyclables and the disposal of solid waste.

15. The geographic scope of the Authority is over 2,600 square miles, which encompasses both Oneida and

---

[6] Oneida County Executive Statement Re: Contractual Relationship between the Counties and the Authority, November 7, 1988.

[7] R. Julian Ltr. to Oneida County Attorney, September, 1989.

Herkimer Counties. Seventy-nine (79) different cities, towns and villages are located within the Counties. Even today, only nine of the seventy-nine provide municipal waste collection services.[8]

IV. The Local Flow Control Laws' Impact on Interstate Commerce is More than Incidental

16. The Counties' Flow Control Laws affect more than approximately 200,000 tons of solid waste annually. Under these laws, virtually all of this waste is required to be collected and delivered to facilities designated by the Oneida-Herkimer Solid Waste Management Authority. Pursuant to the Authority's integrated waste management plan, all such facilities are to be located within the two Counties. There is ample evidence (discussed below) that absent the Counties' Flow Control Laws, this waste would be transported, processed and disposed of in the interstate solid waste market, as is waste generated elsewhere in upstate New York and throughout the United States.

17. First, because the Authority has not yet sited its proposed landfill, the Authority has been forced to turn to the interstate market itself. The Authority issued requests for proposals from private waste management firms starting in May 1990. This led to a contract with an out-of state waste facility through 1998. Between December 1991 and December 1998, the Authority shipped virtually all of the non-recyclable waste generated in the Counties to the Empire Landfill in Taylor. Pennsylvania. Even when the Authority rebid for services in 1998 and chose a contractor with a landfill located in New York State

---

[8] Defendants' Response to Plaintiffs' Second Set of Interrogatories, number 11.

(but outside the Counties), the presence of an interstate market was readily apparent. Another bidder had an out-of-state facility, and the selected contractor ultimately designated a backup landfill located in Erie, Pennsylvania. This interstate presence brings price discipline to in-state bidders and demonstrates the interstate nature of the solid waste disposal market. Thus, the Counties and the Authority have participated in and benefited from the very interstate market from which the Authority plans to withdraw.

18. Second, while the Authority's present interim program allows out-of-state disposal site providers to compete periodically for the Counties' waste and for haulers to compete for delivery to the Authority's facilities, interstate competition is not at the level that would be expected in the absence of flow control. Absent flow control, it is likely that more out-of-state landfills, incinerators, and haulers would be involved in handling waste generated in the Counties. There is strong evidence that this is the case. The geographic scope of the market as indicated by bids received by the Authority puts landfills or waste to energy facilities in Connecticut, Rhode Island, New Hampshire, Pennsylvania, New Jersey, Massachusetts and Vermont in play as potential recipients of the solid waste generated in the Counties. (See Exhibit 2).

19. Although out-of-state disposal firms have some access to waste from the Counties through the Authority's interim periodic bidding process, more landfills would be involved absent the single point of access created by the Flow Control Laws. In addition, waste haulers are restricted from fully participating in the interstate market. For example,

several of the plaintiffs have identified out-of-state landfills that they either had used or were approached by before the Counties' Flow Control Laws were enacted.[9] Plaintiff Levitt identified the Chambers Landfill in Millersburg, Pennsylvania, and a landfill in Virginia as economic alternatives to the Authority's designated facilities. Plaintiff Bliss had contracted with a landfill in Ohio for construction and demolition waste as an alternative. Plaintiff Guerriero identified the Greentree Landfill in Pennsylvania as an alternative. As shown in Exhibit 2, this supports an even more expansive interstate market than the Authority bid records, adding Ohio, West Virginia, Virginia, Maryland and Delaware. The Flow Control Laws clearly prevent local haulers from benefiting from the highly competitive interstate solid waste disposal market and impose substantial costs on these haulers. For example, the Flow Control Laws require multi-county haulers who seek to operate in interstate markets to separate waste by county of origin. This imposes the burden of additional record keeping. It often forces haulers to create inefficient collection routes and purchase or retain additional equipment or employees. As a result, economies of scale in transport are often lost.

20. The Counties' Flow Control Laws also buck the trend toward large regional waste markets, which frequently extend into several states. As discussed below, changes in regulation and industry structure have led to wide geographic markets served by large regional landfills. Consequently, the efficient economic management of solid waste will only conform to local and state governmental boundaries by happenstance. Thus, and perhaps most

---

[9] Affidavits of Levitt, Bliss, and Guerriero.

importantly, the Counties' Flow Control laws, especially once fully implemented, if widely followed by other local governments, would severely restrict or eliminate interstate commerce.

V. The Purpose and Benefits of Flow Control

21. Flow control generally refers to legal restrictions imposed by local, regional or state governments on the transport and disposal of solid waste. Historically, these governments have found flow controls attractive to meet one or more of the following objectives: 1) protecting a public investment from competition; 2) subsidizing a public purpose; 3) avoiding the subsidization of external users; and 4) achieving self-sufficiency. Each of these objectives are protectionist in nature and restrict the interstate waste disposal market. At the same time, none of these objectives is consistent with the efficient allocation of resources.[10] The first three objectives are intended to thwart competitive pressures that would regularly result in an efficient distribution of waste disposal sites and serve essentially to further financial objectives; Waste disposal costs to those residing or working in regions governed by flow control actually increase as a result. The fourth objective rejects the benefits of the competitive market in favor of self-reliance without

---

[10] Several academic studies have demonstrated the efficiency losses attributable to flow control. See, Eduardo Ley, Molly K. Macauley, Stephen W. Salant, "Spacially and Intertemporally Efficient Waste Management: The Costs of Flow Control," Resources for the Future, Working Paper 96-23, July 1996; Eduardo Ley, Molly Macauley, and Stephen Salant, "Restricting the Trash Trade," American Economic Review, Vol. 90, No. 2, May 2000; Richard C. Porter, *The Economics of Waste*, Resources for the Future, Washington, D.C., 2002.

considering the costs or burdens on interstate commerce.

22. The first objective generally addresses investments in incinerators or resource recovery plants (disposal facilities that burn trash and generate steam for electricity generation, heating, or industrial purposes). These plants are expensive to build and require substantial revenue streams to justify their construction and continued operation. Revenue streams from electricity and/or steam sales were expected to make it possible to charge disposal or tipping fees at levels consistent with landfills, the most common waste disposal alternative. Actual revenues, however, frequently fell short of achieving this objective, either because of plant performance problems, changes in air quality regulations, low energy content in the waste stream or changes in electricity markets.[11] As a result, plant operators were forced to raise tipping fees to meet debt obligations. Higher fees made alternative disposal sites more attractive, potentially drawing waste and revenues away. Flow control was imposed to prevent waste generators or transporters from moving to these

---

[11] Changes in government regulations were largely responsible for three of these problems. More stringent state and federal air quality standards imposed new costs on incinerators. The energy content of waste streams began to fall as governments also began imposing recycling requirements that eliminated paper and plastics from wastes delivered to the plants for a time. Federal regulations under the Public Utility Regulatory Policies Act (PURPA) guaranteed high electricity rates for resource recovery plants by directing that utilities pay so-called avoided costs to independent power producers. While these payments were high initially, new power plant construction and slower demand growth quickly lowered them.

lower cost alternatives.[12] In response to this flight risk, flow control became a required element of resource recovery plant investments and the financing of such facilities became problematic without flow control in place.[13] Flow control has also been used to protect material recovery facilities, municipal landfills and, as in *Carbone*, transfer stations from market competition.[14]

23. There is no doubt that in the absence of flow control, most solid waste markets would be interstate, especially those in the northeast where land costs and population densities are high. Changes in regulatory and industry structure have led to expansive geographic markets served by regional landfills. Stringent federal environmental regulations have increased the start up and construction costs for new landfills. As these costs do not vary substantially with landfill size, there is an incentive to construct larger facilities in order to spread fixed costs over greater volumes of disposed waste. These larger facilities can charge lower rates than similarly designed smaller sites, thereby drawing waste from more distant origins. Consequently, efficient markets will rarely if ever conform to local political

---

12 As of 1998, almost half of all resource recovery plants constructed since 1965 benefited from flow control. Most of the other half relied on long term contracts to avoid market pressure.

13 See for example, John Carlin, "The Impact of Flow Control and Tax Reform on Ownership and Growth in the U.S. Waste-to-Energy Industry," Energy Information Administration, *Monthly Energy Review*, September 1994 and Martha M. Canan, "Moody's to Drop More Ratings Unless Flow Control Laws Protected," *The Bond Buyer*, June, 2, 1995. Note that immediately following the *Carbone* decision Moody's lowered its ratings on bonds associated with 14 facilities and gave 33 others unfavorable rating outlooks.

14 *C & A Carbone, Inc. v. Town of Clarkstown*, N.Y. 511 U.S. 383 (1984)

boundaries. As the number of landfills has fallen nationwide over the past two decades, the average size of these facilities has increased substantially, and the amount of waste shipped across state borders has more than doubled.

24. The solid waste industry as a whole, including collection, transportation and disposal services, began to undergo a period of consolidation following these regulatory changes leading to larger more vertically integrated waste management companies.[15] As waste collectors, vertically integrated companies are more likely to be willing to transport garbage to their own disposal sites, even if those sites are somewhat more distant than the closest local landfill. In fact, when locating and constructing new landfills, large integrated firms will search for sites that can serve as many sources of waste as economically as possible, often across state borders. Such facilities require a larger investment of capital and the acquisition of specialized trucks, rail cars and transfer stations to make longer hauls cost efficient.

25. In the face of these trends, flow controls result in the destruction of commerce among the states and seriously constrain markets at great costs to waste generators and private waste firms. Disposal rates have generally fallen notably where flow controls have been eliminated. In Hennipen County Minnesota, for example, tipping fees fell from $95 per ton to only $45 per ton when flow control was lifted. Similarly, in Nassau County, New York, tipping fees fell from $108 per ton to $76 per ton when flow control ended following the *Carbone* decision. A study conducted for Browning Ferris

---

[15] Office of Technology Assessment, Facing America's Trash: What Next For Municipal Solid Waste, October 1989, pp. 53-54.

Industries found that flow control increased tipping fees by almost 40 percent.[16] A study by the National Solid Waste Management Association found similar differences.[17]

26. The second objective – subsidizing a public purpose – refers to investments in recycling and materials recovery programs and facilities. Flow control has proved an attractive means to finance such programs and facilities. Excluding private sector scrap metal and most paper recycling operations, few, if any, recycling programs succeed at covering their own costs through sales. By directing the flow of waste to recycling and/or materials recovery facilities (MRFs), local governments can impose fees on all waste generators or transporters to cover unmet recycling facility capital and operating costs. In the absence of this flow control revenue, governments would be forced to finance recycling through direct charges on the disposal of recyclable materials and/or through taxation. Governments dislike the first alternative because it is likely to discourage rather than promote recycling. Governments dislike the second alternative because raising taxes is rarely popular. In addition, it is sometimes argued that taxes fail to distribute costs primarily to the waste generators. While these may seem to be reasoned objections, they misconstrue the use of fees and taxes. Undifferentiated tipping fees often associated with flow control lead to inefficient levels of recycling and hide the true cost of recycling from local residents. Having to directly respond to taxpayers through taxes

---

[16] National Economic Research Associates, "The Cost of Flow Control," prepared for BFI, May 3, 1995.

[17] As reported in Michelle Roberts, "Sink or Swim: Local Governments Go With the Flow, *World Wastes*, December, 1994, p. 48.

and fees directly related to the services provided can serve as an incentive, not present in Oneida and Herkimer Counties, to be both innovative and cost conscious.

27. Based on an extensive study, the U.S. Environmental Protection Agency determined that flow control is not essential for the long-term achievement of source reduction and recycling goals.[18] Following an exhaustive nationwide review, the EPA found no data to support the need for flow control. Specifically, the EPA stated:

> there are no data showing that flow controls are essential either for the development of new solid waste capacity or for the long term achievement of State and local goals for source reduction, reuse and recycling.

The EPA also found that, while flow control was employed to benefit a substantial share of capital intensive MRFs, only 2.7 percent of recycled materials were subject to flow control.[19]

28. Flow control also is imposed to capture greater volumes of recyclables in order to lower unit recycling costs. Arguably, with greater volume, a recycling facility's capital costs are spread over more tons, thereby lowering unit costs. While this may improve the financial performance of the facilities and reduce the market prices necessary to break even, it does not in the end promote greater recycling. Lower unit costs alone will not increase the demand

---

[18] U.S. Environmental Protection Agency, Office of Solid Waste, Municipal and Industrial Solid Waste Division, Report To Congress, Flow Controls and Municipal Solid Waste, March 1995.

[19] U.S. Environmental Protection Agency, Report to Congress, Flow Controls and Municipal Solid Waste, March 1995.

for recycled materials. Market prices for many recycled materials remain low, but absent demand they often end up in landfills.[20] In addition, if funds are used to expand the number of recycled materials handled, unit costs per recycled ton may not fall at all.

29. The third objective – avoiding the subsidization of external users – refers to preventing non-taxpayers from benefiting from tax supported or subsidized public projects. In this circumstance, flow control works to keep waste out rather than in. Government run facilities are constructed for the benefit of local residents and businesses. If they would otherwise offer lower cost (because of tax support) or more convenient disposal services to non-residents, then some barrier must be erected to keep non-residents out. Moreover, in the case of a landfill with a finite life, the local government may want to save capacity for its residents. For the reasons noted above, however, waste for burning or recycling is often exempt from this restriction because more waste is better. Restricting out of county waste also protects the public facility from competition. A private company will rarely locate a waste management facility (i.e., a landfill, transfer station, waste-to-energy or recycling facility) within a jurisdiction if it does not have access to local waste. The result is often above-market waste disposal costs.

30. The fourth objective – self-sufficiency – refers to the objective that each government should be responsible for its own waste. Meeting this objective means restricting waste flow in both directions. There should be no imports or exports. Although self-sufficiency is a laudable objective in many cases, it is

---

[20] See R. Porter, *The Economics of Waste*, Resources for the Future, 2002.

not an efficient objective when it comes to solid waste. Cities, counties, and states all possess certain comparative advantages that go unrecognized when the objective of self-sufficiency is imposed. Indeed, the Commerce Clause was intended to promote the recognition of comparative advantages. The clause was intended to prevent the states from erecting trade barriers that would protect high cost local industries from low cost competitors in other states – at a cost to both consumers and the more efficient industries. As stated by Justice O'Connor, in her concurring opinion in *Carbone*, "pervasive flow control would result in the type of balkanization the Commerce Clause is primarily intended to prevent."

31. As discussed above, the trend toward large, cost-effective and environmentally protective geographic markets in solid waste argues against local self-sufficiency.

32. In addition, self-sufficiency also generally refers to reliance on the public sector to provide waste management services. There is no reason that this should be the case. Solid waste management does not meet the criteria for a natural monopoly where a single operator run by or regulated by a local or regional government is the most efficient solution. Although there are economies of scale in disposal, virtually all markets can or do support several competitors. Entry barriers, especially for hauling, are extremely low and, as a consequence, most markets include numerous hauling companies.

33. It is also important to recognize that solid waste management is not solely a traditional public sector

enterprise.[21] Many markets historically have been served by the private sector. A survey of cities in New York State in 1984, for example, found that 42 percent of these cities relied on the private sector for residential waste collection and another 4 percent contract out these services to private firms. Over 70 percent of the cities relied on the private sector for commercial waste collection and another 4 percent contract out these services to private firms.[22] (See Exhibit 3.) Over the period 1991 through 2001, privately owned landfills have increased from 46 percent to 60 percent.[23] Private firms are even more dominant in waste hauling. A 1970 survey identified over 10,000 waste disposal firms, mostly family run.[24] A more recent study indicates that 82 percent of the garbage sector trucks in the United States are owned and operated by private companies.[25]

---

21 A study of solid waste practices from 1880 to 1980 shows that the private sector has continually had an important role in waste collection and disposal. In 1880, only 24 percent of 149 cities with populations exceeding 247,000 relied on public provision of these services. Between 1880 and 1924 this percentage varied considerably, but never exceeded 63 percent. Martin V. Melosi, Garbage in the Cities, Refuse, Reform, and the Environment, 1880-1980, Texas A&M Press: College Station, 1981.

22 Survey by Ecodata Inc., reproduced in Privatization for New York: Competing for a Better Future, A Report of the New York State Senate Advisory Commission on Privatization, January, 1992, p. 220.

23 Solid Waste Digest, Vol 12, No.15, May, 2002, p. 1.

24 Jose A. Gomez-Ibanez, John R. Meyer and David E. Luberoff, "What are the Prospects for Privatizing Infrastructure? Lessons from U.S. Roads and Solid Waste," in Is There a Shortfall in Public Capital Investment?, Federal Reserve Bank of Boston, June 1990, pp. 143-174.

25 Gordon, Burdelski, and Cannon, "Greening Garbage Trucks: New Technologies for Cleaner Air", INFORM, Inc. (New York, NY).

34. This is also the case in Oneida and Herkimer Counties. A Malcolm Pirnie Engineers study, performed for the Herkimer-Oneida Counties Planning Program, reported that as of 1969 "many of the towns [in the Study Area] have no provision for waste disposal" (p. 101) and that the Counties played no role in waste management. In fact, 40 percent of the Study Area had no organized waste collection (p. 1) and "arrangements with private contractors constitute[d] a major portion of the collection effort." (p 1).

35. That pattern continues today. Of the 79 cities, towns and villages in the two Counties only nine provide direct municipal collection services, while 16 provide for collection through contracts with private haulers. The remaining 54 provide no service.[26]

36. Thus, the evidence demonstrates that the notion that waste collection and disposal both typically and traditionally are local government functions is simply not accurate — nationally or in these Counties. Accordingly, to the extent that self-sufficiency is offered as an objective intended to meet a traditional government function, it cannot be sustained.

VI. The Purposes and Benefits of Oneida and Herkimer Counties' Local Laws

37. The Counties' Flow Control Laws objectives are consistent with those discussed above. They are intended to protect local investments and subsidize environmental and social objectives. As noted above, flow control is a poor tool to reach these objectives as it results in an inefficient allocation of resources. This is evidenced by tipping fees well in excess of

---

[26] This excludes road cleanup, brush removal or hauling of municipality-generated wastes or recyclables.

those found elsewhere in New York State in jurisdictions without flow control. Fees charged by the Oneida-Herkimer transfer stations are 68 percent higher than the New York State average. At the same time, the counties here achieved no substantial improvements regarding recycling, waste reduction and public health and safety when compared to jurisdictions without flow control. Below, I review the objectives of the Flow Control Laws and their consequences.

38. Oneida County Local Law No. 1 of 1990 and Herkimer County Local Law No. 1 of 1990 both require all waste generated in each County (excluding certain categories of recyclables) to be collected by government entities or licensed haulers and delivered only to facilities designated by the Oneida-Herkimer Solid Waste Management Authority. The stated purpose of the Flow Control Laws is "to provide for public health and safety and to facilitate the conservation of vital natural resources" and to "facilitate the sale of recyclable materials."

39. Robert F. Julian, the original drafter of Oneida County Local Law No. 1 of 1988, the precursor to Oneida County Local Law No. 1 of 1990 (see Section III above), has explained in his July 5, 1995 affidavit that the Local Law was enacted in response to the public's desire for "a new recycling based approach" (¶ 45). He offers a more detailed list in paragraph 46 of his affidavit of the objectives that the local law was intended to meet, namely:

    - To replace high volume undifferentiated waste and disposal with a system that would match the best management method to each component of solid waste;

- To make waste reduction and recycling the legally mandated top priorities for solid waste in the County;
- To establish and expand markets for recyclables;
- To protect public health, safety and welfare by requiring regular collection and environmentally sound waste processing and disposal through the Counties;
- To stop backyard burning and roadside dumping of waste;
- To make sure that both recyclables and waste would be set out at the road by waste generators in a form and manner to insure its proper delivery to the recycling and disposal facilities;
- To establish a basic framework of responsibility, consistent with state and federal laws for waste generators, haulers towns villages, cities and the county or its agents; and
- To conserve vital natural resources.

40. In reviewing these objectives it is critical to distinguish between the objectives of the recycling/waste management provisions of the law and the financing provisions of the law. This is consistent with the Second Circuit's admonishment in its *United Haulers* decision that the analysis of flow control ordinances should be severed from other aspects of a waste management plan. *United Haulers*, 261 F.3d 245, 267 (2001).

41. In reality, the Local Laws, as implemented through the Oneida-Herkimer Solid Waste Authority, serve a dual purpose – first, the prioritization of recycling as a key component of what is identified as integrated waste management; and second, flow control. As

explained in Section III, the available history establishes that the flow control objectives of Oneida County are consistent with the general flow control objectives reviewed in the previous section of this report. Thus, the unstated objectives of the Flow Control Law in both Counties was 1) to protect Oneida County's existing and proposed future investments; 2) to finance recycling facilities (principally the MRF) and other non-self-sufficient services without additional taxation; and 3) to protect a government-run landfill from open market competition. As simply stated by the Executive Director of the Authority, "when waste is taken out of the Authority system, it also diverts the revenue needed to operate Authority facilities and services."[27]

42. The Oneida-Herkimer Solid Waste Management Authority was created in 1988 to establish an "integrated system of solid waste disposal" and to alleviate "important public health and environmental concerns." Its stated objectives are consistent with those associated with the local recycling laws. The major step toward integration took place in 1989, when the Authority executed two Agreements with the Counties, and in 1990 when, pursuant to the Agreements, the Authority took control of the Oneida Energy Recovery Facility (ERF) waste-to-energy plant, including its long-term financial obligations, and purchased the Materials Recycling Facility (MRF). The goal of the Authority is clearly to make the counties self-sufficient in the collection and disposal of solid waste. The Authority's plans call for the operation of eight facilities: a landfill, a recycling center; a combined household and small quantity generator hazardous waste facility, a green

---

[27] H. Arnold Ltr. to Richard Lynch, February 1, 2001.

waste and a hard waste facility (e.g., tree stumps) and three transfer stations. The system, as designed, would manage all residential and commercial waste generated in the Counties. The transfer stations serve as central collection points where waste is collected and transhipped for disposal in a landfill.

43. In 1990 and 1991, bonds totaling $50.9 million were issued by the Authority to finance several years of operations, the purchase of the existing facilities, the financial obligations the Authority assumed from the Counties and to build a new transfer station and the planned landfill. Exhibit 4 breaks down the bond issues by facility. The MRF accounted for over 45 percent of the total bond obligations. The acquisition of the ERF accounted for another 11.4 percent. In 1995, the Oneida ERF was closed leaving the Authority with revenue bond liabilities that represented a large fraction of its $5.-80 million acquisition cost. Consequently, the Authority collects revenues principally through tipping fees to cover not only operating costs at its active facilities, but also to cover these financial obligations as well. As indicated in the Authority's 2001 budget proposal, almost one-third of the tipping fees it collects go to debt service As shown in Exhibit 5, about 6 percent are allocated to recycling, green waste and household hazardous waste. These figures, however, understate the revenue shares allocated to these facilities and programs because they exclude debt service on related capital investment, such as the MRF facility.

44. Flow control has not only enabled the Counties to cover the cost of the failed resource recovery plant, it also has enabled the Authority to heavily subsidize its recycling efforts, while at the same time removing solid waste management expenditures as a line item

in the Counties' tax-funded budget. Exhibit 6 shows that without tip fee revenues, all of the Authorities other programs have operated at a loss in most years.

45. As a result of these subsidies, total tipping fees charged by the Authority are well above the average in New York State. The Oneida Herkimer transfer stations charge $86 per ton ($79 under contract), which compares to an average of only $51.18 per ton for transfer stations in the state.[28]

46. Flow control will also protect the Counties' planned landfill from competition. The landfill will have a guaranteed demand and not be subject to competitive pressure from landfills outside the counties or the threat of entry into the market by a private landfill or transfer stations. No private investor will choose to locate within the counties if local waste is inaccessible.

47. In addition, the premise behind the Authority is of questionable economic validity. The benefits of a centrally planned integrated waste management system are not obvious. As noted above, many local governments, including those in Oneida and Herkimer Counties, continue to rely on the private sector to adequately meet solid waste disposal needs.

48. The benefit of a government run system with respect to environmental liability is also questionable. Historically, government run facilities were often the least environmentally responsible. For example, as shown in Exhibit 7, a large percentage of municipal landfills that have become Superfund sites were publicly run. Almost a third of the landfills designated as Superfund sites in New York State were owned by municipal or county governments.

---

[28] Solid Waste Price Index, August 2002.

Unsupervised city or county dumps, frequently with free access, often became serious environmental problems. In contrast, many private facilities were closely supervised and charged fees sufficient to monitor disposal and provide some insurance protection against environmental damage.

49. It is also not clear that vital natural resources are being protected by the Flow Control or the recycling provisions in the local laws. The planned Authority landfill is proposed to be placed in a wetland area and will require exemptions from some environmental controls in order to be completed. Absent the flow control laws, waste generated in the Counties could continue to be shipped to approved landfill sites that do not compromise wetlands. In addition, no evidence has been offered to demonstrate that all (or any) of the materials accepted for recycling actually save natural resources.

VII. The Authority's Financial Purposes Could be Met By Other Means and the Intended Benefits of Recycling and Waste Reduction do not Result from Flow Control

50. Taxes, fees, regulations, and contracts are effective means to meet the objectives of the Authority and the purpose behind flow control (i.e., finance the integrated waste management system). These means have much less impact on interstate commerce. Moreover, controls at the state or federal level may be more appropriate and have even less impact on commerce. The list of non-financial objectives to be met by the Local Laws presented above (paragraph 39) could be met by means other than flow control. A brief review of the Counties' objectives follows and their alternatives follow.

51. Waste reduction and recycling were the top mandated priorities according to the legislative history. The EPA, however, found that flow control was not necessary to meet these priorities and that other methods were available to local governments. The experience elsewhere in New York State bears this out. Numerous counties in New York State have achieved recycling and waste reduction levels equal to or better than Oneida and Herkimer Counties without flow control. As shown in Exhibit 8, 12 counties without flow control equal or exceed the Counties recycling levels. Eleven of these have never implemented flow control. These counties rely on a number of mechanisms to achieve these levels, including special taxes and fees[29]. Exhibit 9 shows that 33 counties have achieved lower waste generation per capita levels than Oneida and Herkimer Counties without flow control. At least twenty-six of them have never relied on flow control.

52. The EPA, as referenced earlier also found that flow control was unnecessary to protect the public health and safety. The EPA stated, "protection of human health and the environment is directly related to the implementation and enforcement of federal, State, and local government regulation. Regardless of whether State or local governments administer flow control programs, States are required to implement and enforce federally approved regulations that fully protect human health and the environment. Accordingly, there are no empirical data showing that flow control provides more or less protection."

53. The source separation objective can be met through regulation.

---

[29] Lisa M. Porter, "OCRRA NY State Waste Survey, June 2000 (http://www.ocrra.org/Survey Results-Table of Contents.htm).

54. Consistent with the EPA finding, the prevention of illegal dumping can be met through regulation. Indeed, because flow control artificially increases the cost of waste disposal, it potentially encourages illegal dumping.

55. The prevention of illegal burning can be met through regulation as well. Again, because flow control artificially increases the cost of waste disposal, it potentially encourages illegal burning.

VI. Conclusion

56. Based on my review, I have concluded that the flow control imposed by these laws, whether it instituted to provide a financial mechanism for protecting public investment or for sponsoring environmental or other social objectives, clearly interferes with interstate commerce. This interference is not outweighed by any local benefits that could not be achieved by other less intrusive means. Moreover, protecting a public investment is not a public benefit if it costs taxpayers more than relying on private enterprise. As documented here, the citizens and businesses of Oneida and Herkimer Counties are paying a substantial premium to support public investments. At the same time, other counties are achieving objectives similar to those outlined by County officials without flow control.

VII. Documents Considered

57. I considered the following documents in developing my opinions expressed above:

1. Affidavit of Robert F. Julian, Ex. J-11. July 5, 1995.

2. Office of Technology Assessment. "Facing America's Trash: What Next for Municipal Solid Waste?" October 1989.

3. National Economic Research Associates. "The Cost of Flow Control." Prepared for BFI, May 3, 1995.

4. Roberts, Michelle. "Sink or Swim: Local Governments Go with the Flow". World Wastes. December, 1994.

5. U.S. Environmental Protection Agency. Office of Solid Waste. Municipal and Industrial Solid Waste Division. Report to Congress. Flow Controls and Municipal Solid Waste. March 1995.

6. Porter, R. The Economics of Waste, Resources for the Future. 2002

7. Melosi, Martin V. Garbage in the Cities, Refuse, Reform and the Environment, *1880-1980*. Texas A&M Press; College Station, 1981.

8. New York State Senate Advisory Commission on Privatization. Privatization for New York: Competing for a Better Future. January 1990.

9. Solid Waste Digest. Volume 12, Number 15. May 2002.

10. Jose A. Gomez-Ibanez, John R. Meyer and David E. Luberoff, "What are the Prospects for Privatizing Infrastructure? Lessons from U.S. Roads and Solid Waste," in Is There a Shortfall in Public Capital Investment? Federal Reserve Bank of Boston, June 1990.

11. Gordon, Burdelski, and Cannon, "Greening Garbage Trucks: New Technologies for Cleaner Air", INFORM, Inc. (New York, NY).

12. Solid Waste Price Index, August 2002.

13. Porter, Lisa M. "OCRRA NY State Waste Survey, June 2000 (http://www.ocrra.org/Survey).

A list of additional documents that I considered is presented in Exhibit 10.

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct.

Executed this 15th of November, 2002, at Oakland, California.

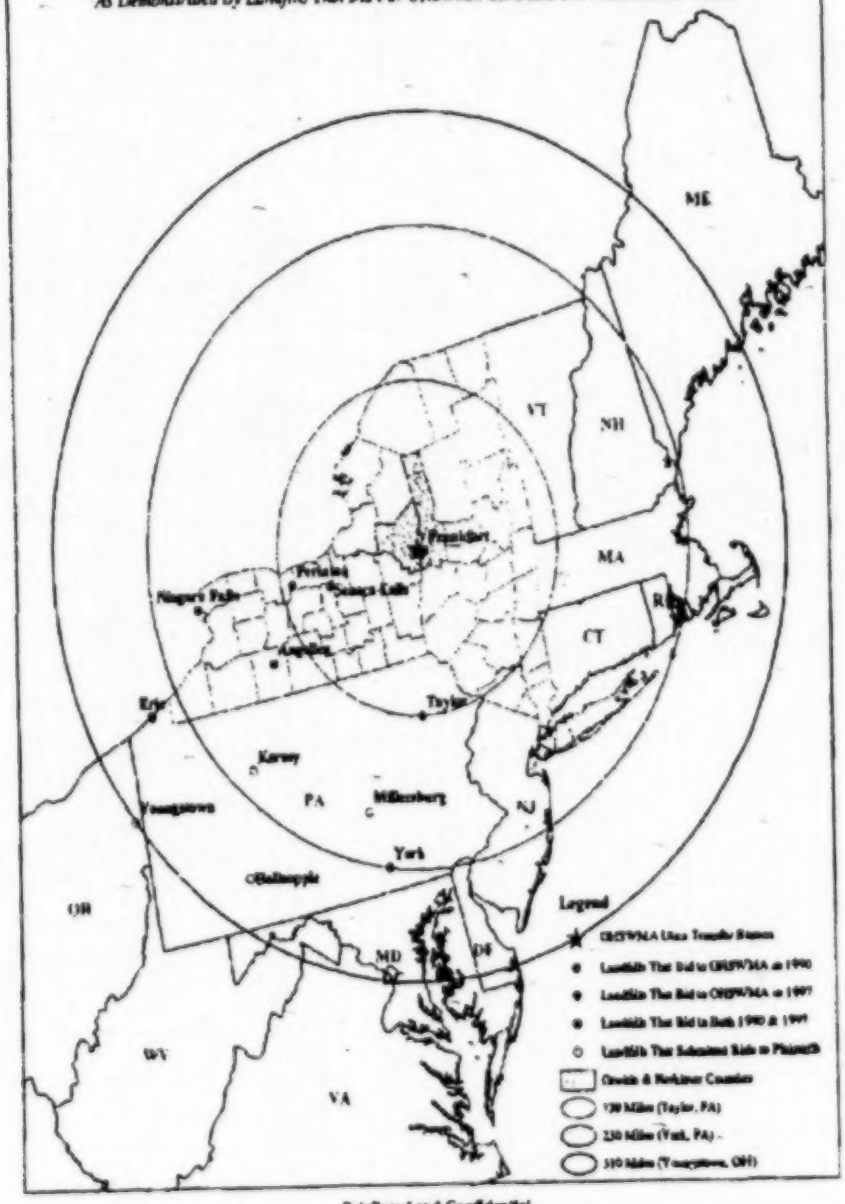
/S/Mark P. Berkman
Mark P. Berkman

[EXH. 1 – BERKMAN CV OMITTED IN PRINTING]

Exhibit 2

Geographic Market For Oneida & Herkimer County Waste Is Multi-State

As Demonstrated By Landfills That Bid For OHSWMA Contracts or Private Hauler Waste



Privileged and Confidential
Prepared at the Request of Counsel

Exhibit 3

Cities in New York State Have Historically Relied Heavily on the Private Sector for Waste Collection

Percent of Cities Relying on Different Collection Arrangements in 1984

Collection Arrangement	Residential Service	Commercial Service
Municipal	54%	25%
Private	42%	71%
Contract	4%	4%
Total	100%	100%

Source: Survey performed by Ecodata, Inc. Westport, CT, presented in Stevens, Barbara. "Solid Waste Management." Privatization for New York: Competing for a Better Future – A Report of the New York State Senate Advisory Commission on Privatization. Ed. E.

Exhibit 4

Allocation of OHSWMA Series 1990A and 1991 Bond Issues

	($)	%
Eastern Transfer Station		
Acquisition and Construction of TFS (1991 Bonds)	1,386,440	2.7%
Energy Recovery Facility		
Acquisition of the ERF (1991 Bonds)	5,801,127	11.4%
Materials Recovery Facility		
Deposit to Construction Fund (1990 Bonds)	19,509,421	38.3%
Materials Recovery Account (1990 Bonds)	3,635,619	7.1%
Total MRF	23,145,040	45.5%
Other		
Deposit to Debt Service Reserve Fund (1990 Bonds)	4,280,000	8.4%
The General Administrative Account (1990 Bonds)[1]	2,383,992	4.7%
The Project Studies Account (1990 Bonds)[2]	3,731,722	7.3%
The Capitalized Interest Account (1990 Bonds)[3]	7,930,716	15.6%
Costs of Issuance (1990 Bonds)	1,328,530	2.6%
Deposit to Debt Service Reserve Fund (1991 Bonds)	685,064	1.3%
Costs of Issuance (1991 Bonds)	227,369	0.4%
Total Other	20,567,393	40.4%
Total	**$50,900,000**	

Notes

(1) Administrative and operating costs of the Authority are expected to be paid from the proceeds of the Series 1990A Bonds and other funds expected to be received upon acquisition by the Authority of the MRF through January 1, 1994.

(2) Engineering and legal fees of the Authority are expected to be paid from the proceeds of the Series 1990A Bonds.

(3) Interest (including annual fees to be paid to the Bank and the Remarketing Agent) is capitalized from the date of delivery of the Series 1990A Bonds through April 1, 1993 at an assumed interest rate of 8.075 percent.

Sources

(1) OHSWMA Series 1990A Bond Issue (A 000012)

(2) OHSWMA Series 1991 Bond Issue (A 000236)

Exhibit 5
Budgeted Allocation of OHSWMA Tip Fee in 200

Function	($) Per Ton	%
Central Support	2.78	3.5%
Recycling Center	4.28	5.4%
Disposal	46.87	59.3%
Administration	0.85	1.1%
Green Waste Compost	0.05	0.1%
Household Hazardous Waste	0.38	0.5%
System Debt Service	23.79	30.1%
Total	79.00	

Source: Memorandum from Hans G. Arnold re: Proposed 2001 Budget, 10/30/00 (A 002723 - 002725)

Exhibit 6
In the Absense of Disposal Tip Fees, The Authority's Other Facilities Would Operate At a Loss

Net Balance of Facilities (Revenue - Appropriations), Excluding Tip Fees

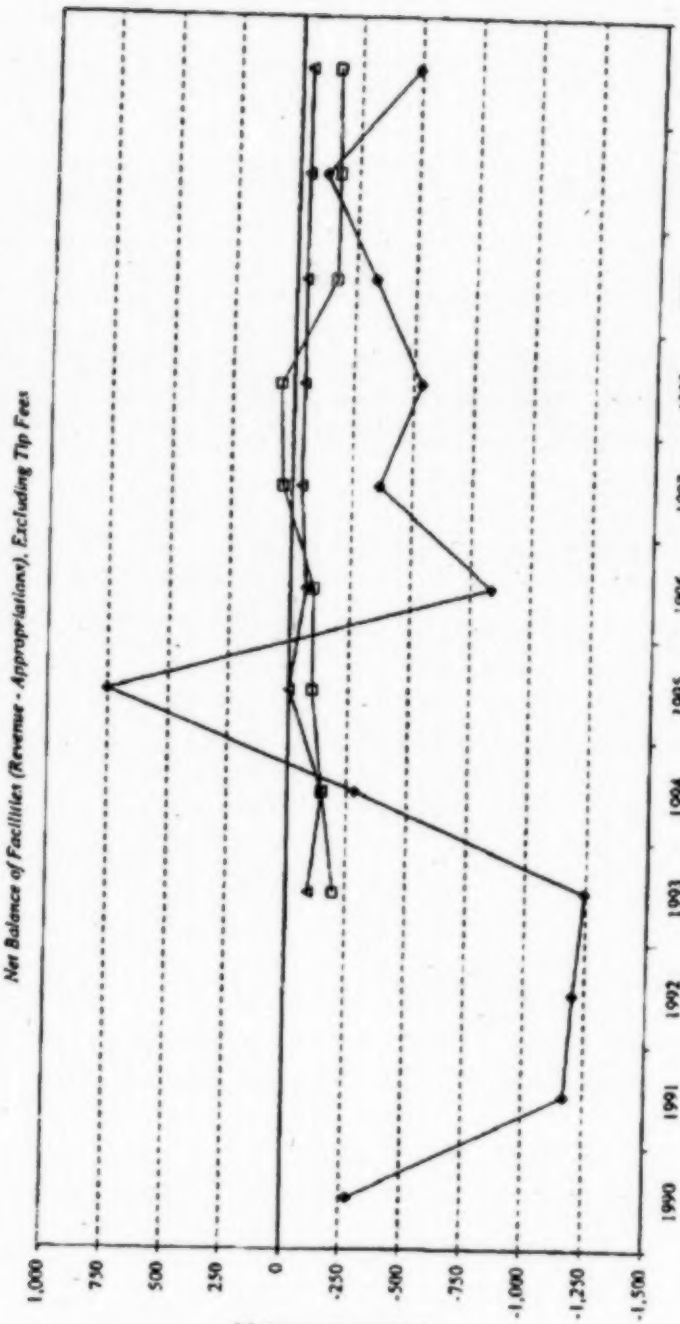


Exhibit 7
A Substantial Share of Landfill Superfund Sites are Owned by Local Governments

Landfill National Priority List Superfund Sites in 1990

US Total

	N	%
Landfill Sites Owned by Local Government[1]	31	15.58%
Landfill Sites that are Privately Owned	61	30.65%
Other[2]	107	53.77%
Total	199	

New York State

	N	%
Landfill Sites Owned by Local Government[1]	6	31.58%
Landfill Sites that are Privately Owned	5	26.32%
Other[2]	8	42.11%
Total	19	

Notes

(1) Local ownership is identified as "Municipality"or "County Owned."

(2) 'Other' category includes: (i) Federally Owned, (ii) State Owned, (iii) Indian Lands, (iv) Mixed Ownership, & (v) Other.

(3) US and NY NPL totals calculated from EPA's CERCLIS database. Totals only include NPL sites where the site category was identified as "Landfill." In NY, there were 10 sites where the category was not identified. In the US, there were 234 sites where the category was not identified.

(4) Note: Data reflect Superfund sites that had an NPL status of "Final" or "Proposed" in August, 1990.

Source: EPA's CERCLIS database.

Exhibit I

Many New York Counties Have Achieved Equal or Better Recycling Rates Than Oneida-Herkimer Without Imposing Flow Control

Percent of Waste Stream Recycled in New York State Counties or Solid Waste Management Units in 1995, Units in Tons

Rank	Waste Management Unit	Total	Disposed	Recycled	% Recycled	Flow Control in 1995	Flow Control Prior to Carbone Decision[2]
1	SCHUYLER COUNTY	41,709	13,269	28,440	68.18%	NO	NO
2	ONONDAGA COUNTY RRA	995,482	368,066	627,533	63.03%	NO	NO
3	WARREN/WASHINGTON COUNTIES	28,686	10,633	17,953	62.73%	NO	NO
4	BROOME COUNTY	299,875	115,783	184,372	61.48%	NO	NO
5	JEFFERSON COUNTY	178,068	70,687	107,379	60.29%	NO	YES
6	CATTARAUGUS COUNTY	130,238	62,133	71,325	53.76%	NO	NO
7	ORANGE COUNTY	12,281	5,789	6,491	52.88%	NO	NO
8	SHELTER ISLAND	4,898	2,259	2,639	51.04%	NO	NO
9	CAYUGA COUNTY	134,795	59,631	75,163	55.76%	NO	NO
10	SOUTHAMPTON	14,688	9,139	5,549	36.55%	NO	NO
11	ALLEGANY COUNTY	33,439	27,442	17,997	36.58%	NO	NO
12	EAST HAMPTON	32,444	19,288	13,156	40.54%	NO	NO
13	ONEIDA-HERKIMER Fm AUTHORITY	930,360	536,148	393,363	42.28%	YES	YES
14	LEWIS COUNTY	42,286	23,827	18,366	43.42%	NO	NO
15	MONROE COUNTY	1,679,826	777,409	902,411	53.73%	NO	YES
16	ORANGE COUNTY	361,253	184,638	176,871	48.93%	NO	NO
17	TOMPKINS COUNTY	106,551	61,344	45,207	42.36%	-	-
18	WESTCHESTER COUNTY	1,317,833	894,403	423,378	32.13%	-	-
19	STEUBEN COUNTY	317,399	138,964	84,433	42.68%	NO	NO
20	DELAWARE COUNTY	30,203	43,253	28,527	48.13%	NO	NO
21	NORTHWEST COMMUNITIES OF ERIE CO.	254,668	154,267	95,959	39.21%	NO	NO
22	COLUMBIA COUNTY	63,264	34,859	28,660	34.41%	NO	NO
23	ERIE	378,599	256,643	126,726	28.23%	NO	NO
24	ALBANY COUNTY/ANSWERS	225,455	97,287	64,668	36.50%	NO	NO
25	NEW YORK CITY	9,219,888	5,871,858	3,365,833	36.86%	NO	NO
26	TIOGA COUNTY	30,983	20,681	11,292	35.13%	NO	NO
27	CORTLAND COUNTY	42,760	27,371	14,747	34.58%	-	-
28	HUNTINGTON	173,859	113,686	57,831	36.46%	NO	NO
29	BROOKHAVEN	389,463	191,917	97,546	43.68%	NO	NO
30	CHEMUNG COUNTY[3]	29,286	19,136	9,678	32.45%	YES	YES
31	ST. LAWRENCE COUNTY RRDA	51,493	34,398	16,772	31.27%	NO	YES
32	OYSTER BAY	244,823	169,871	73,752	30.54%	NO	NO
33	CHAUTAUQUA COUNTY	335,727	170,348	164,979	30.82%	-	-
34	ERIE COUNTY	14,753	10,383	4,330	45.47%	NO	YES
35	SMITHTOWN	144,333	103,572	42,599	29.15%	NO	NO
36	BABYLON	247,259	179,648	68,021	27.97%	NO	NO
37	HEMPSTEAD	863,484	634,638	243,854	27.81%	NO	NO
38	NORTH HEMPSTEAD	348,287	188,316	62,991	36.49%	NO	NO
39	DUTCHESS CO. SOL. RECOV. AGENCY	348,774	229,138	51,636	26.27%	NO	YES
40	LEWIS CO.	225,741	166,127	37,619	22.75%	NO	NO
41	OLEY COVE	25,844	17,479	3,513	36.19%	NO	NO
42	GLOW REGION SWM COMMITTEE	126,132	93,649	38,283	22.78%	NO	NO
43	LONG BEACH (CITY)	35,752	23,209	6,643	22.41%	NO	NO
44	WESTERN FINGER LAKES SWMA	21,201	161,256	43,847	21.69%	-	-
45	SCHENECTADY COUNTY	134,456	106,241	28,233	21.01%	NO	NO
46	MADISON COUNTY[4]	43,241	34,250	8,991	20.75%	NO	NO
47	CESCOMM	73,858	60,061	13,881	19.03%	-	-
48	ROCKLAND COUNTY SWM AUTHORITY	322,709	268,507	60,802	19.52%	-	-
49	HAMILTON COUNTY	8,687	6,890	1,377	16.99%	NO	NO
50	ERIE SWMA	9,591	8,199	1,396	14.33%	NO	NO
51	FULTON COUNTY	72,083	56,146	8,937	11.80%	NO	YES
52	CHEMUNG COUNTY[5]	99,744	90,221	9,423	9.45%	YES	YES
53	NIAGARA COUNTY	218,442	192,859	19,883	9.35%	-	-
54	CLINTON COUNTY	54,503	51,336	3,167	5.14%	NO	NO
55	CITY OF BUFFALO	167,719	153,002	14,586	8.70%	NO	NO
56	SULLIVAN COUNTY	71,678	66,901	4,777	6.64%	NO	NO
57	SARATOGA COUNTY	121,764	114,254	3,510	6.17%	NO	NO
58	NIOSA SWM AUTHORITY	136,138	123,677	5,031	4.91%	NO	YES
59	FRANKLIN COUNTY SWM AUTHORITY	31,676	28,984	692	2.36%	NO	YES

Notes

(1) "-" identifies waste management units that have been considered, but have not responded.

(2) C & A Carbone, Inc. v. Town of Clarkstown, New York, 114 S.Ct. 1677, Decided June 11, 1994.

(3) Chemung and Chemung Counties prohibit the dumping of non-chemung waste at public facilities. They do not prohibit waste generated within the counties from leaving.

(4) Madison County implemented waste flow on its February 2002. The law requires flow control to continue similar to those implemented in Oneida and Herkimer Counties.

Sources

(1) Waste and recycling amounts reported to the New York State Department of Environmental Conservation (NYSDEC) Solid Waste Bulletin, 1995. Figures from 1994 are the most recent published data from the NYSDEC.

(2) Flow control requirements obtained through personal contact with regional administrators.

Exhibit 9

Many New York Counties Have Achieved Lower Per-Capita Waste Than Oneida-Herkimer Without Imposing Flow Control

Per-Capita Waste Generated in New York State Counties or Solid Waste Management Units in 1995, Ranked by Tons

Rank	Waste Management Unit	Population in 1995	Waste Disposed	Per-Capita Waste	Flow Control in 1995	Flow Control After In Carbone Decision[3]
1	FRANKLIN COUNTY SWM AUTHORITY	51[illegible]	[illegible]	[illegible]	NO	YES
2	GREENE COUNTY	48,739	3,789	0.93	NO	NO
3	SOUTHAMPTON	66,906	7,159	0.86	NO	NO
4	WARREN/WASHINGTON COUNTIES	98,851	10,835	0.28	NO	NO
5	COLUMBIA COUNTY	63,309	11,727	0.95	NO	NO
6	BROOME	37,933	8,199	0.33	NO	NO
7	ESSEX COUNTY	39,253	10,781	0.29	NO	YES
8	ST. LAWRENCE COUNTY SWDA	111,800	36,760	0.33	NO	YES
9	ALBANY COUNTY/ANDREWS	219,423	72,807	0.31	NO	NO
10	CHENANGO COUNTY[4]	51,290	19,174	0.28	YES	YES
11	TIOGA COUNTY	35,317	28,941	0.90	NO	NO
12	GLOW REGION SWM COMMITTEE	219,523	95,946	0.60	NO	NO
13	BROOKHAVEN	415,000	181,937	0.90	NO	NO
14	MADISON COUNTY[4]	71,709	34,330	0.48	NO	NO
15	CITY OF BUFFALO	300,000	135,000	0.91	NO	NO
16	ALLEGANY COUNTY	50,476	27,945	0.54	NO	NO
17	BROOME COUNTY	211,327	153,387	0.55	NO	NO
18	NORTH HEMPSTEAD	213,000	130,710	0.63	NO	NO
19	CORTLAND COUNTY	49,000	27,973	0.57	-	-
20	ORANGE COUNTY	331,000	184,618	0.59	NO	NO
21	HUNTINGTON	195,000	113,894	0.68	NO	NO
22	SARATOGA COUNTY	199,000	114,134	0.80	NO	NO
23	CLINTON COUNTY	83,139	51,336	0.60	NO	NO
24	OYSTER BAY	285,013	169,871	0.66	NO	NO
25	LONG BEACH (CITY)	34,334	23,789	0.63	NO	NO
26	TOMPKINS COUNTY	94,097	61,346	0.65	-	-
27	ISLIP	338,549	206,643	0.66	NO	NO
28	WESTCHESTER/PUTNAM SWMA	265,870	163,396	0.67	-	-
29	NORTHWEST COMMUNITIES OF ERIE CO.	229,853	154,587	0.67	NO	NO
30	GLEN COVE	25,000	17,229	0.69	NO	NO
31	JEFFERSON COUNTY	110,961	76,642	0.71	NO	YES
32	SCHUYLER COUNTY	18,662	13,200	0.71	NO	NO
33	SCHENECTADY COUNTY	149,283	106,241	0.71	NO	NO
34	CATTARAUGUS COUNTY	83,000	62,372	0.75	NO	NO
35	ONEIDA-HERKIMER SW AUTHORITY	316,700	236,100	0.75	YES	YES
36	COLONIE	78,000	60,840	0.78	-	-
37	ONONDAGA COUNTY RRA	463,000	368,060	0.79	NO	NO
38	NRRA SWM AUTHORITY	183,000	151,877	0.81	NO	YES
39	NEW YORK CITY	7,380,000	5,974,028	0.80	NO	NO
40	LEWIS COUNTY	26,796	22,102	0.82	NO	NO
41	HEMPSTEAD	756,000	624,630	0.83	NO	NO
42	NIAGARA COUNTY	219,859	182,398	0.83	-	-
43	HUNTINGTON	193,000	169,932	0.84	NO	NO
44	BABYLON	206,543	173,680	0.87	NO	NO
45	OUTCROSS CO. RES. RECOV. AGENCY	268,000	229,230	0.88	NO	YES
46	DELAWARE COUNTY	47,000	42,252	0.96	NO	NO
47	CAYUGA COUNTY	83,331	73,431	0.83	NO	NO
48	CHEMUNG COUNTY[4]	97,500	96,231	0.93	YES	YES
49	ADIRONDACK COUNTY SWM AUTHORITY	168,000	168,000	0.96	-	-
50	SULLIVAN COUNTY	69,000	68,701	0.97	NO	NO
51	EAST HAMPTON	16,300	16,300	1.01	NO	NO
52	WESTCHESTER COUNTY	875,000	896,000	1.02	-	-
53	SHELTER ISLAND	2,361	2,713	1.06	NO	NO
54	MONROE COUNTY	713,958	777,420	1.09	NO	YES
55	FULTON COUNTY	55,533	66,140	1.19	NO	YES
56	OSWEGO COUNTY	149,000	184,137	1.24	NO	NO
57	STEUBEN COUNTY	99,000	125,766	1.27	NO	NO
58	HAMILTON COUNTY	5,279	6,696	1.27	NO	NO
59	CHAUTAUQUA COUNTY	142,000	178,249	1.26	-	-

Notes:

(1) "-" Identifies waste management units that have been contacted, but have not responded.

(2) C & A Carbone, Inc. v. Town of Clarkstown, New York, 114 S.Ct. 1677, Decided May 16, 1994.

(3) Chenango and Chemung Counties prohibit the dumping of out-of-county waste at public landfills. They do not prohibit waste generated within the counties from leaving.

(4) Madison County implemented waste flow restrictions in February 2001. The two counties first enacted measures similar to those implemented in Oneida and Herkimer Counties.

Sources:

(1) Waste and recycling tonnages reported in the New York State Department of Environmental Conservation (NYSDEC) Recovery Matters 1994. Figures from 1995 are the most recent published data from the NYSDEC.

(2) Flow control information obtained through personal contact with regional administrators.

Exhibit 10

Documents Reviewed as of 11/15/02

Bates			Document Title
OC	7	- 7	Notice of Public Hearing
OC	8	- 8	Oneida County Executive's Letter of Approval regarding Local Law Introductory "I" of 1989 re: collection and disposition of solid waste
OC	9	- 10	Minutes of Public Hearing re: collection and disposition of solid waste
OC	12	- 25	Oneida County Board of Legislators Resolution No. 335
OC	26	- 70	Oneida County Board of Legislators Resolution No. 356
OC	124	- 126	Oneida County Executive's correspondence to Oneida County Board of Legislators re: additional material
OC	241	- 244	Oneida County Board of Legislators Resolution No. 249
OC	607	- 621	Contract of Sale between the County of Oneida and OHSWMA re: Materials Recovery Facility (MRF)
OC	901	- 903	Agreement of Lease Between County of Oneida and OHSWMA
OC	964	- 965	Oneida County Board of Legislators Resolution Approving Lease/Purchase Agreement for the Energy Recovery Facility
OC	1021	- 1022	OHSWMA correspondence to Oneida County Executive re: the disposition of the Oneida-Herkimer Materials Recovery Facility
HC	2	- 3	No. 32 Resolution of the Special Committee on SWM and the Committee on Finance Authorizing Intermunicipal Agreement for Public Education and Information Programs in Connection with SWM
HC	4	- 5	Minutes of Public Hearing re: Local Law No. 4 for 1988
HC	9	- 10	Report and Resolution of the Special Committee on Solid Waste Management
HC	19	- 19	Resolution No. 348 of the Special Committee on Solid Waste Management for the Adoption of a Service Fee Allocation Agreement

Exhibit 10

Bates		Document Title
HC 30	- 39	SEQR Positive Declaration Notice of Intent to Prepare a Draft Generic Environment Impact Statement Determination of Significance
HC 266	- 267	Revised Draft Proposed Local Law for the Collection and Disposition of Solid Waste
HC 272	- 281	Draft Herkimer County Local Law #4 of 1988 Schedule for Implementation
ACF 4	- 4	Oneida County Dept. of Solid Waste Management correspondence to Waste Management of NY re: the intent to establish transfer station
ACF 10	- 12	Oneida County Dept. of SWM letter to the Chairman of the Environmental Conservation Committee, Board of Legislators re: Draft Local Law Limiting the Importation of Solid Waste
ACF 28	- 29	Oneida County Dept. of Solid Waste Management memo to Oneida County Executive re: Long-Term Financial Analysis
ACF 35	- 37	Oneida County Dept. of Solid Waste Management correspondence re: Contractual relationship between Counties and the OHSWMA
ACF 38	- 39	Oneida County Dept. of Solid Waste Management memo to Oneida County Executive re: New York State Mandates
ACF 42	- 43	Oneida County Dept. of Solid Waste Management correspondence re: contracts regarding the Energy Recovery Facility and Ash Landfill
ACF 49	- 49	Oneida County Dept. of Solid Waste Management correspondence to James Carrey re: recyclables
ACF 51	- 57	Oneida County Dept. of Solid Waste Management correspondence to the Chairman of the Environmental Conservation Committee, Board of Legislators re: proposed minor changes to Local Law #1
ACF 66	- 66	Oneida County Dept. of Solid Waste Management memo to Oneida County Executive re: ERP Retrofit Regulations
ACF 86	- 89	Oneida County Dept. of Solid Waste Management correspondence to Spohn's Disposal Service re: response to waste haulers regarding representation on the Authority
ACF 90	- 91	Oneida County Dept. of Solid Waste Management correspondence to ParMacro re: Oneida County Energy Recovery Facility
A 1	- 77	OSHWMA Solid Waste System Revenue Bonds
A 78	- 294	OSHWMA Solid Waste System Revenue Bonds

Exhibit 10

Bates	Document Title
A 295 - 472	OSHWMA Solid Waste System Revenue Bonds
A 473 - 559	OSHWMA Solid Waste System Revenue Bonds
A 560 - 650	OSHWMA Solid Waste System Revenue Bonds
A 651 - 696	OHSWMA documents re: District Formation Authorities
A 697 - 812	OHSWMA documents re: Document Request Authority Regulations #13
A 813 - 843	NYSDOH Comprehensive Solid Waste Planning Study
A 845 - 894	Draft Solid Waste Management in Eastern Oneida and Herkimer Counties Long Range Alternatives
A 895 - 974	Solid Waste Management, Eastern Oneida and Herkimer Counties, Final Draft Report, Long Range Alternatives
A 970 - 974	Oneida County Dept. of Solid Waste Management Memo
A 975 - 979	Solid Waste Management Program, Solid Waste Practices and Citizen Attitudes Regarding Recycling in Oneida-Herkimer
A 980 - 1012	Solid Waste Management Program, Commercial and Industrial Waste Utilization Study, Oneida-Herkimer Counties
A 1013 - 1026	Draft Report to the Common Council of the City of Utica, NY and the Oneida County Department of Solid Waste Management: Billing and Payment Alternatives
A 1027 - 1045	Solid Waste Management Program, Source Separation/Recycling Program Definition
A 1046 - 1187	OHSWMA Final Generic Environmental Impact Statement and Local Solid Waste Management Plan
A 1188 - 1189	OHSWMA correspondence with Shirley Donnelly
A 1190 - 1191	Memo from Oneida County Dept. of Solid Waste Management to Chief Elected Officials and correspondence to the Mayor of the City of Utica re: Draft Generic Environmental Impact Statement

Exhibit 10

Bates	Document Title
A 1223 - 1228	Transcript of Landowners' Meeting on Preliminary Hydrogeologic Tests
A 1282 - 1287	OHSWMA Waste Control Plan for the Oneida County Energy Recovery Facility in Rome, NY
A 1288 - 1302	OHSWMA Amendments to the Local Solid Waste Management Plan
A 1303 - 1308	OHSWMA Recycling in Oneida and Herkimer Counties
A 1309 - 1323	OHSWMA Landfill Siting Methodology Final Environmental Impact Statement
A 1324 - 1328	ACAL correspondence to OHSWMA Board of Directors re: opposition to proposed landfill in the Township of Ava
A 1329 - 1355	Waste Disposal and Transportation Cost-Initial Comparison of Export Proposals and Cost Estimate for Use of Site G
A 1356 - 1359	March 1993 Solid Waste Characterization Study for OHSWMA - TOC and Conclusions
A 1360 - 1480	5/5/96 Oneida-Herkimer Counties Solid Waste Management System Draft Report - System Status and Future Alternatives
A 1481 - 1527	OHSWMA Draft Environmental Impact Statement for Site WLF-5 East
A 1545 - 1585	OHSWMA Request for Quotations for Commercial Collection Services
A 1586 - 1648	OHSWMA response to 11/13/96 comment letter from the ACOF for site WLF-5 East, proposed sanitary landfill in the Town of Ava, NY
A 1649 - 1680	State Environmental Quality Review Act Statement of Findings
A 1681 - 1764	OHSWMA Solid Waste Disposal Services, Request for Proposals (RFP)
A 1765 - 1783	OHSWMA, Oneida-Herkimer Transfer Stations RFP description of "the reserve disposal contract," a brief
A 1795 - 1820	Agreement for Design and Construction of Transfer Stations between Empire Sanitary Landfill, Inc. and OHSWMA

Exhibit 10

Bates	Document Title
A 1830 - 1831	Interim Disposal Contract Extension Agreement
A 1832 - 1859	Agreement for Interim Utilization of Landfill and Amendments 1-8
A 1861 - 1878	Construction and Demolition Debris Transportation and Processing Agreement
A 1879 - 1890	Memo re: Proposed New Disposal Contract
A 1891 - 1893	Appendix C State Environmental Quality Review Short Environmental Assessment Form for Unlisted Actions Only re: New Landfills Contract
A 1896 - 1959	Solid Waste Transporting and Disposal Agreement
A 1960 - 1962	High Acres Contract Modification and related correspondence
A 1963 - 1969	Memo from Hans G. Arnold, Exec. Dir. to Authority Board re: High Acres Option and Extension
A 1970 - 1971	Resolution No. 4 Exercise of Contract Options
A 1972 - 1974	Correspondence from R. Sturges, Waste Management of New York, LLC, to Hans G. Arnold re: Alternative Waste Disposal Facility
A 1975 - 1976	Waste Disposal Agreement, Modification re: Oneida Limited
A 1977 - 1997	Agreement for the Collection and Haul of Recyclables in the City of Utica, New York (sample contract)
A 1998 - 2014	Solid Waste Collection and Disposal Agreement between OHSWMA and Waste Management of New York (copy of sample contract between the Authority and the Haulers)
A 2015 - 2061	Memo from Comptroller to Authority Attorney re: Lowest Net Cost Analysis of Proposals for an Interim Disposal Agreement
A 2062 - 2076	OHSWMA, Report on Audited Financial Year Statements, Year Ended December 31, 1990
A 2077 - 2092	OHSWMA, Report on Audited Financial Year Statements, Year Ended December 31, 1991

Exhibit 10

Bates			Document Title
A	2093	- 2106	OHSWMA, Report on Audited Financial Year Statements, Year Ended December 31, 1992
A	2107	- 2120	OHSWMA, Report on Audited Financial Year Statements, Year Ended December 31, 1993
A	2121	- 2134	OHSWMA, Report on Audited Financial Year Statements, Year Ended December 31, 1994
A	2135	- 2147	OHSWMA, Report on Audited Financial Year Statements, Year Ended December 31, 1995
A	2148	- 2160	OHSWMA, Report on Audited Financial Year Statements, Year Ended December 31, 1996
A	2161	- 2173	OHSWMA Financial Statements and Report of Independent Certified Public Accountants 1997 and 1996
A	2174	- 2187	OHSWMA Financial Statements and Report of Independent Certified Public Accountants 1998 and 1997
A	2188	- 2202	OHSWMA Financial Statements and Report of Independent Certified Public Accountants 1999 and 1998
A	2203	- 2216	OHSWMA Financial Statements and Report of Independent Certified Public Accountants 2000 and 1999
A	2217	- 2244	OHSWMA Board Reports 2001 and 2000
A	2245	- 2325	OHSWMA 1989 Annual Report
A	2327	- 2351	OHSWMA 1990 Annual Report
A	2352	- 2383	OHSWMA 1991 Annual Report
A	2384	- 2408	OHSWMA 1992 Annual Report
A	2409	- 2452	OHSWMA 1993 Annual Report
A	2453	- 2494	OHSWMA 1994 Annual Report

Exhibit 10

Bates	Document Title
A 2495 - 2531	OHSWMA 1995 Annual Report
A 2532 - 2570	OHSWMA 1996 Annual Report
A 2571 - 2601	OHSWMA 1997 Annual Report
A 2602 - 2633	OHSWMA 1998 Annual Report
A 2634 - 2668	OHSWMA 1999 Annual Report
A 2669 - 2702	OHSWMA 2000 Annual Report
A 2703 - 2750	OHSWMA 2001 Annual Report
A 2751 - 2776	OHSWMA, Board Reports, December 2001 and 2000, 1999 through 2001
A 2777 - 2843	Memo from Comptroller to Authority Board re: 2002 Budget Package Package
A 2844 - 2858	OHSWMA, Public Comments on the Final Generic Environmental Impact Statement and Local Solid Waste Management Plan, Volume 9, Appendix N
A 2859 - 2891	OHSWMA, Transcript of Public Comment Meeting re: Environmental Report on Candidate Landfill Sites
A 2893 - 2898	OHSWMA, Transcript of Authority Meeting re: Draft Environmental Impact Statement on Proposed Landfill
A 2899 - 2922	OHSWMA, Transcript of Authority Meeting re: Draft Environmental Impact Statement on Proposed Landfill
A 2923 - 3016	Exhibit DD, Hearing Transcript and Written Comments, OHSWMA Final Environmental Impact for Site WLE 5 East, a Proposed Sanitary Landfill in the Town of AVA, New York
A 3017 - 3043	NYSDEC and United States Army Corps of Engineers, Transcript of Joint Legislative Hearing
A 3062 - 3064	NYSDEC Issues Conference re: Proposed Landfill Site in Ava, New York, August 28 & 29, 2000

Exhibit 10

Bates	Document Title
A 3063 - 3070	Resolution No. 26 - Approval of O-HSWM Budget
A 3071 - 3079	OHSWMA 1991 Budget File
A 3080 - 3099	OHSWMA 1992 Budget File
A 3100 - 3111	OHSWMA 1993 Budget File
A 3112 - 3123	OHSWMA 1994 Budget File
A 3124 - 3135	OHSWMA 1996 Budget File
A 3141 - 3151	OHSWMA 1997 Budget File
A 3152 - 3168	OHSWMA 1998 Budget File
A 3169 - 3233	OHSWMA 1999-2000 Budget File
A 3234 - 3307	OHSWMA 2000 Budget File
A 3308 - 3308	Cross-reference to 1991 Revenue & Appropriations report
A 3309 - 3432	1999 Quarterly Financial Reports
A 3433 - 3560	2000 Quarterly Financial Reports
A 3561 - 3696	2001 Quarterly Financial Reports
A 3697 - 3763	2002 Quarterly Financial Reports
A 3764 - 3774	1990 Revenue/Appropriation Analysis

Exhibit 10

Bates	Document Title
A 3775 - 3790	1992 Revenue/Appropriation Analysis
A 3791 - 3803	1993 Revenue/Appropriation Analysis
A 3804 - 3815	1994 Revenue/Appropriation Analysis
A 3816 - 3831	1995 Revenue/Appropriation Analysis
A 3832 - 3849	1996 Revenue/Appropriation Analysis
A 3850 - 3867	1997 Revenue/Appropriation Analysis
A 3868 - 3886	1998 Revenue/Appropriation Analysis
A 3887 - 3888	OHSWMA letter to residents and businesses regarding Oneida and Herkimer County Recycling
A 3889 - 3904	OHSWA Memorandum re: Contract Recyclables
A 3905 - 3905	Estimated 2000 Population Distribution (Map)
A 3906 - 3906	Areas Served by Existing Waste Disposal (Map)
A 3907 - 3907	Main Transportation Facilities (Map)
A 3908 - 3917	Draft Environmental Impact Statement, Oneida County Energy Recovery Facility, Rome, NY
A 3919 - 3932 ~	March 1976 Recovery of Energy and Materials from Solid Waste, proposal by the Oneida County Solid Waste Agency
A 3934 - 3935	Information re: Oneida County Department of Solid Waste Management Energy Recovery Facility
A 3936 - 3943	Oneida-Herkimer Counties Material Recovery Facility, Analysis of Direct Authority Operation Versus Indirect Authority Operation Through Private Contractor

Exhibit 10

Bates	Document Title
A 3944 - 3963	Analysis of Potential Debt Restructuring and ERF Acquisition
A 3964 - 4074	Agreement of Sub-Sublease, County of Oneida Landlord, O-HSWMA-Tenant, dated as of 1/1/90 re: Landfill, Teaberry Road, Rome, NY
A 4075 - 4094	ERF Lease Payment Construction Costs Documents
A 4095 - 4130	Draft Report - April 1994 Energy Recovery Facility Future Options
A 4134 - 4136	Documents re: Purchase of Land Occupied by the Ash Landfill
.	Affidavit of Jeff Bliss of Bliss Enterprises, Inc.
.	Affidavit of Marcella Guerriero of Transfer Systems, Inc.
.	Argument descriptors of United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority from law.com
.	Affidavit of David Levitt of Levitt's Commercial Containers, Inc.
.	Defendant County of Herkimer's Answer
.	Letter and Index of Documents from Kevin Murphy
.	Index of documents sent by Devorsetz Strazzano
.	Correspondence from OHSWMA's attorney regarding discovery issues
.	Affidavit in Opposition of Hans G. Arnold
.	County of Oneida, NY Single Audit Reports for the year ended 12/31/89
.	United Haulers Association, Inc. v. O-HSWMA, County of Oneida, County of Herkimer 261 F. 3d 245 (2d Cir 2001)

Exhibit 10

Bates	Document Title
	County of Oneida, NY Financial Statements for the years ending 12/31/91 through 12/31/01 (inclusive)
	Defendant County of Oneida's Answer
	Documents re. sale of Materials Recovery Facility (Bates No. OC 00640-652; 782-784; 812-814; 844-845).
	Summons and Verified Complaint
	Cover Letter and TOC from Devorsetz Stenzano
	Index of documents produced by Oneida-Herkimer Solid Waste Management Authority (OHSWMA)
	County of Oneida, NY Financial Statements for the year ending 12/31/90
	County of Herkimer, NY General Purpose Financial Statements for 1991 (full report) and 1992-1996 and 1998-2001 (internet pages).
	Bonding Documents (Bates No. OC 325-331; 333-3[illegible] 602-605; 678; 684; 713-714)
	Defendant O-HSWMA's Answer

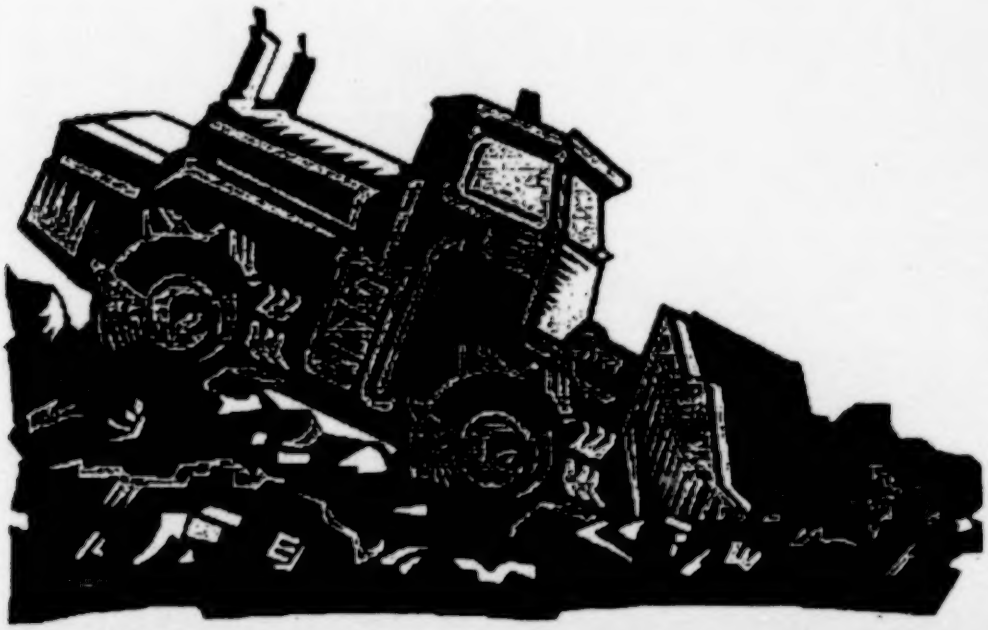
NSWMA Research Bulletin 02-01 February 2002

Interstate Movement Of Municipal Solid Waste

By Edward W. Repa, Ph.D.

Since the late 1980s, a number of states have been concerned about the amount of solid waste they were receiving from out-of-state sources for disposal. Some states attempted to pass legislation that would regulate these flows. However, federal courts declared that any such restrictions were unconstitutional. At the same time, Congress considered, but did not pass, numerous bills that would have provided states with the authority to control interstate waste shipments.

Because of the continuing congressional interest in interstate waste shipments, Congress in 1990 requested that the Congressional Research Service (CRS) determine the amount of municipal solid waste (MSW) moving interstate. CRS has updated its interstate report five times, most recently in 2001. This report summarizes the information collected by CRS on the movement of MSW interstate and provides data from select states that have reported interstate MSW flows since the publication of the 2001 CRS report.



National Trends

Figure 1 shows the growth in MSW exports and imports based on the CRS data. The import and export data follow similar trends; however, the data are not equal because of problems with the way states collect the data. According to CRS's 1990 report, about 12.6 million tons of MSW were exported in 1989 and 10.8 million tons of MSW were imported. The amount of MSW exported and imported by states has nearly tripled over the last 11 years. Exports between 1989 and 2000 rose to more than 31.1 million tons, almost a 150 percent increase, and imports rose to more than 32.1 million tons, almost a 200 percent increase.

Table 1 provides MSW exports and imports by state and the percent of a state's MSW exports or imports based on the state's generation rate (i.e., imports or exports divided by generation). On average, less than 8 percent of the waste generated in the United States was exported to another state for disposal in 2000 and about 9 percent of the waste was imported by another state for disposal.

State Trends

Figure 2 shows the extensive and intricate web of interstate MSW movements in 2000 between states and across U.S. borders with Canada and Mexico. The CRS data identified 135 waste interactions, where an interaction is the movement of MSW between two states or countries as an import or export. More than 135 interactions occurred in 2000; however, the CRS report did not provide data that identified these additional interactions. For example, Ohio provided information to CRS that it received MSW shipments from 10 identified states, but also received shipments from 22 other states that were not identified.

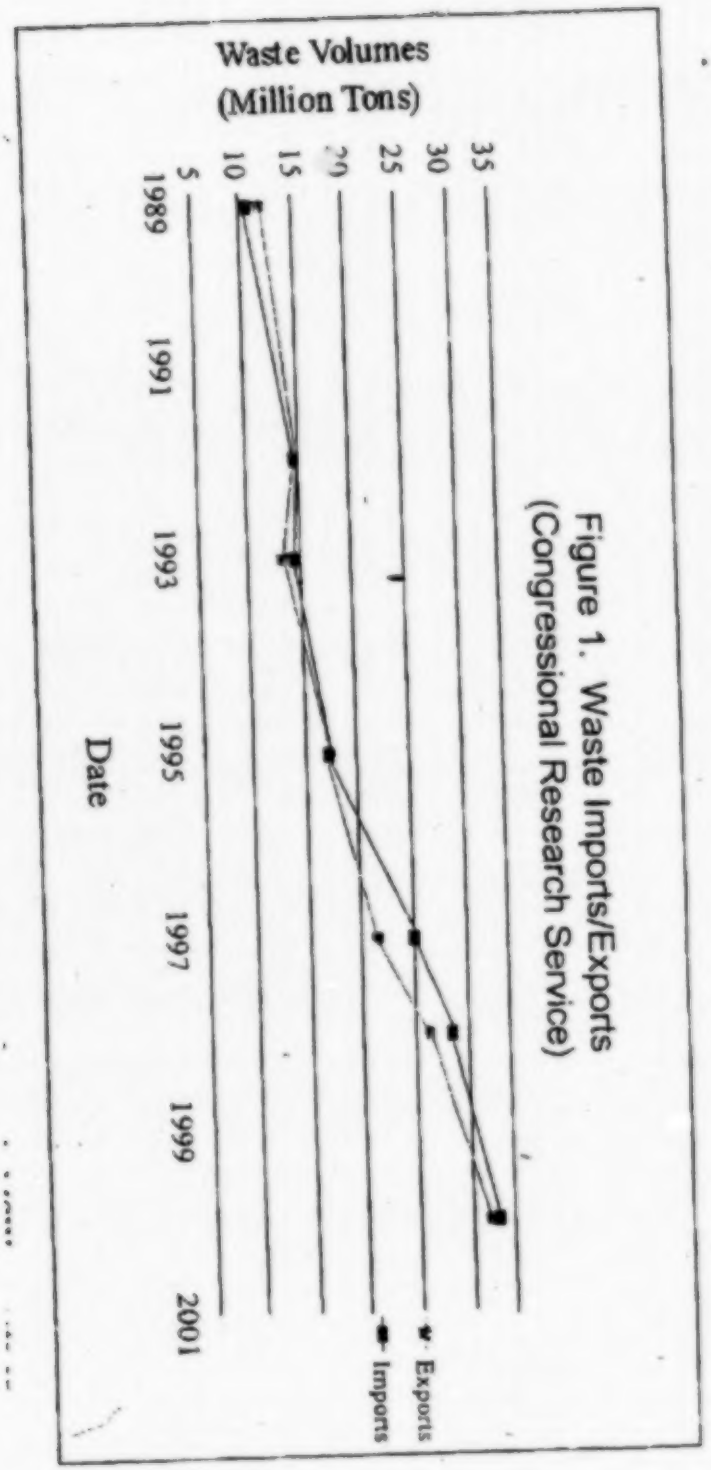


Figure 1. Waste Imports/Exports
(Congressional Research Service)

Of the 135 waste interactions, 113 (84%) were between neighboring states. Furthermore, 68 (50%) of the 135 interactions were paired interactions, where MSW moved as both an import and export between the same two neighboring states. These same trends were reported in previous CRS studies on interstate waste movements.

Exports

In 1989, CRS found that only 13 states and the District of Columbia exported waste to another state for disposal. As the waste volumes increased over the years, so did the number of states exporting waste. In 2000, the number of states exporting waste had grown to 47 plus the District of Columbia, 2 Canadian provinces, and Mexico.

Based on CRS's data for the year 2000 that is presented in Table 1 and Figure 3:

- Eight states exported more than one million tons including California, Illinois, Maryland, Missouri, New Jersey, New York, North Carolina, and Ohio. The number of states exporting more than a million tons of MSW per year doubled in 2000 compared to 1989 when four states (Missouri, New Jersey, New York, and Pennsylvania) exported more than a million tons per year of MSW.
- The state exporting the largest volume of MSW in 2000 was New York (6.8 million tons) followed closely by New Jersey (4.2 million tons).
- Three states (Indiana, Massachusetts, and Washington) and the District of Columbia exported between 0.75 million tons and 1.00 million tons of MSW in 2000.

Table 1. Municipal Solid Waste Imports and Exports by State

State	MSW Generated[1] (10^6 tons/yr)	MSW Imports[2] (10^6 tons)	Percent Imports of Generation	MSW Exports[1] (10^6 tons)	Percent Exports of Generation	Net (Imports-Exports)
AL	5.6	0.210	3.8	0.075	1.3	0.135
AK	0.675	0.000	0.0	0.028	4.1	-0.028
AZ	5.5	0.409	2.4	Neg[3]	—	0.409
AR	2.7	Neg	—	0.054	2.0	-0.054
CA	66.0	0.011	>0.1	1.195	1.8	-1.184
CO	3.9	Neg		0.015	0.4	-0.015
CT	3.2	0.240	7.5	0.554	17.3	-0.314
DE	0.800	0.000	0.0	0.025	3.1	-0.025
DC	1.1	0.000	0.0	0.979	89.0	-0.979
FL	24.6	Neg	—	0.290	1.2	-0.290
GA	9.7	0.516	5.3	0.250	2.6	0.266
HI	2.0	0.000	0.0	0.000	0.0	0.000
ID	0.794	0.018	2.3	0.066	8.3	-0.048
IL	15.1	1.547	10.2	3.146	20.8	-1.604
IN	9.5	1.439	15.1	0.908	9.6	0.531
IA	3.8	0.485	12.8	0.380	10.0	0.105
KS	3.2	0.454	13.6	0.043	1.3	0.391
KY	5.4	0.627	11.6	0.094	1.7	0.531
LA	3.9	Neg	—	0.300	7.7	-0.300
ME	1.7	0.165	9.7	0.051	3.0	0.114
MD	6.8	0.062	0.9	1.791	26.3	-1.729
MA	8.1	0.029	0.4	0.985	12.2	-0.956
MI	15.6	2.840	18.2	0.085	0.5	2.755
MN	5.6	Neg	—	0.620	11.1	-0.620
MS	3.1	0.450	14.5	Neg	—	0.450
MO	10.3	0.183	1.8	1.793	17.4	-1.610
MT	0.968	0.032	3.3	Neg	—	0.032
NE	1.8	0.123	6.8	0.015	1.0	0.105
NV	3.5	0.541	15.5	0.000	0.0	0.541
NH	1.1	0.539	41.5	0.064	8.9	0.475
NJ	8.7	0.836	9.6	4.158	47.8	-3.322
NM	2.1	0.242	7.8	0.000	0.0	0.242
NY	28.7	0.539	1.8	6.807	22.9	-6.268
NC	10.2	0.042	0.4	1.107	10.9	-1.065
ND	0.502	0.054	10.8	Neg	—	0.054
OH	13.1	1.774	13.5	1.040	7.9	0.734
OK	3.6	Neg	—	Neg	—	0.000
OR	4.4	1.240	28.1	0.016	0.4	1.222
PA	14.3	12.238	85.6	0.554	3.9	11.684
RI	0.421	0.000	0.0	0.147	34.9	-0.147
SC	4.6	0.865	18.8	0.057	1.2	0.806
SD	0.447	Neg	—	Neg	—	0.000
TN	5.3	0.297	5.6	0.151	2.8	0.146
TX	36.4	0.047	0.1	0.395	1.1	-0.348
UT	2.4	0.065	2.8	0.061	>0.1	0.065
VT	0.557	0.000	0.0	0.068	15.8	-0.068
VA	10.6	1.891	28.7	0.150	1.4	3.741
WA	6.2	0.243	3.0	0.832	10.1	-0.589
WV	1.5	0.250	16.7	0.305	20.3	-0.055
WI	3.7	1.068	28.9	0.251	6.8	0.817
WY	0.568	Neg	—	Neg	—	0.000
Total/Avg	398.737	35.685	9.2	39.87	7.7	

1. Waste News (July 23, 2001)
2. Congressional Research Service (July 19, 2001)
3. Neg. = Negligible or very small amounts

BEST AVAILABLE COPY

Figure 2. Interstate Shipment of Municipal Solid Waste in 2000 (CRS, 2001)
Note: Map does not include transactions with the District of Columbia.

- Thirteen states (Connecticut, Florida, Georgia, Iowa, Louisiana, Minnesota, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, West Virginia, and Wisconsin) had exports that were less than 0.75 million tons, but greater than 0.10 million tons.
- Twenty-three states (Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Idaho, Kansas, Kentucky, Maine, Michigan, Mississippi, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Vermont, and Wyoming) exported less than 100,000 tons.
- Three states (Hawaii, Nevada, and New Mexico) did not export MSW for disposal to another state.

Only the District of Columbia exported more than 50 percent (89%) of the MSW it generated, with the remainder of the MSW being recycled. This export rate is attributable to the District's lack of disposal capacity within its jurisdiction. New Jersey had the next highest export rate at almost 48 percent followed by Rhode Island at almost 35 percent. All other states had export rates of less than 30 percent of their generation rates. The majority of the exporting states (27 states) exported less than or equal to 10 percent of the MSW that they generated including the states of Alabama, Alaska, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Nebraska, New Hampshire, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, and Wisconsin. Seven states (Arizona, Mississippi, Montana, North Dakota, Oklahoma, South Dakota, and Wyoming) reportedly had exports, but the quantity of the exports was negligible. These seven states likely had exports that were also less than 10 percent of their waste generation rates.

Figure 3. Municipal Solid Waste Exports (2000)

Imports

In 1989, 14 states imported waste for disposal. By the year 2000, 45 states were importing MSW for disposal. The largest importer of MSW was Pennsylvania (12.2 million tons) followed by Virginia (3.9 million tons) and Michigan (2.8 million tons). Based on the year 2000 data presented in Table 1 and Figure 4:

- Eight states imported more than 1 million tons of MSW including Illinois, Indiana, Michigan, Ohio, Oregon, Pennsylvania, Virginia, and Wisconsin. In 1989, only Illinois, Indiana, Ohio, and Pennsylvania imported more than 1 million tons of MSW.
- Twenty states (Alabama, Arizona, Connecticut, Georgia, Iowa, Kansas, Kentucky, Maine, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, South Carolina, Tennessee, Washington, and West Virginia) imported less than 1.0 million tons, but greater than 0.1 million tons.
- Seventeen states (Arkansas, California, Colorado, Florida, Idaho, Louisiana, Maryland, Massachusetts, Minnesota, Montana, North Carolina, North Dakota, Oklahoma, South Dakota, Texas, Utah, and Wyoming) imported less than 100,000 tons of MSW.
- Only 5 states (Alaska, Delaware, Hawaii, Rhode Island, and Vermont) and the District of Columbia did not import MSW for disposal.

Figure 4. Municipal Solid Waste Imports (2000)

Pennsylvania, with the highest volumes of imports, also had the largest amount of imported waste compared to waste generated. Pennsylvania's imports were almost as large as the amount of waste it generated (85.6%) in 2000. Four states had import rates greater than 20 percent when compared to generation rates including New Hampshire (41.5%), Virginia (36.7%), Wisconsin (28.9%), and Oregon (25.1%). Twenty states (Alabama, Arizona, California, Connecticut, Georgia, Idaho, Maine, Maryland, Massachusetts, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, Tennessee, Texas, Utah, and Washington) imported less than 10 percent of the waste they generated.

Net Imports and Exports

Table 1 and Figure 5 contain data on the net volumes of imports and exports (i.e., import volumes minus export volumes) of MSW by state for the year 2000. The data showed:

- Four states had net imports greater than 1 million tons. Pennsylvania was the largest net importer at 11.684 million tons followed by Virginia at 3.741 million tons, Michigan at 2.755 million tons, and Oregon at 1.222 million tons.
- Six states (Indiana, Kentucky, Nevada, Ohio, South Carolina, and Wisconsin) had net imports greater than 500,000 tons, but less than 1 million tons.
- Three states (Massachusetts, Minnesota, and Washington) and the District of Columbia had net exports greater than 500,000 tons, but less than 1 million tons.
- Seven states and Ontario, Canada, had net exports greater than 1 million tons. New York was the largest net exporter at 6.268 million tons, followed by New Jersey at 3.322 million tons, Maryland at 1.729 million

tons, Missouri at 1.610 million tons, Illinois at 1.604 million tons, Ontario at 1.278 million tons, California at 1.184 million tons, and North Carolina at 1.065 million tons.

Figure 5. Net Imports and Exports

As shown in Figure 5, the majority of the states had net imports or exports that were less than 500,000 tons. In fact, 14 states had net imports or exports that were less than 100,000 tons including Alaska, Arkansas, Colorado, Delaware, Hawaii, Idaho, Montana, North Dakota, Oklahoma, South Dakota, Utah, Vermont, West Virginia, and Wyoming.

New Data

A number of states released their 2001 interstate data or revised their 2000 data since the publication of the CRS report. The new or revised import data for the states showed that:

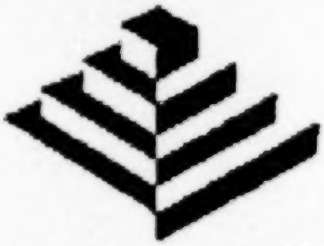
- Indiana imported 1.608 million tons of MSW in 2001 from California, Georgia, Iowa, Illinois, Kansas, Kentucky, Michigan, Missouri, New Jersey, Nevada, Ohio, Tennessee, Texas, Virginia, and Wisconsin. This is 169,000 tons (12%) more waste than in 2000 and an additional 10 states that exported waste to the state for disposal.
- Michigan imported 3.116 million tons of MSW in 2001 from Canada, Illinois, New Jersey, New York, Ohio, Pennsylvania, and Wisconsin. This is 284,000 tons (10%) more waste than in 2000 and an additional 2 states exported waste to Michigan for disposal.
- Ohio revised the list of states that it imported waste from in 2000 to include Alaska, Arkansas, Arizona, California, Connecticut, District of Columbia, Delaware, Georgia, Iowa, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Maryland, Maine, Michigan, Montana, North Carolina, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, Virgin Islands, Vermont, Washington, Wisconsin, West Virginia, and other

unidentified states. This is an additional 22 states that exported waste to Ohio for disposal.

- Virginia revised the list of states that it imported waste from in 2000 to include Alabama, Arkansas, Canada, Connecticut, District of Columbia, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Massachusetts, Maryland, Michigan, North Carolina, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Tennessee, Utah, Wisconsin, and West Virginia. This is an additional 17 states that exported waste to Virginia for disposal.

Based on historical and new data, the amount of MSW moving interstate for disposal will again increase in 2001. Also, the number of states either exporting or importing waste is actually greater than that reported in the CRS report because states are reporting data to CRS before a complete analysis is available or the states' records are incomplete.

This Research Bulletin was produced and is copywrited by the National Solid Wastes Management Association (NSWMA), a part of the Environmental Industry Associations. NSWMA is a non-profit trade association representing for-profit companies in the solid waste business.



National Solid Wastes Management Association
4301 Connecticut Avenue, N.W.
Suite 300
Washington, D.C. 20008
800-424-2869

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF ONEIDA)

DAVID N. LEVITT, being duly sworn, deposes and says as follows:

1. I am the Vice President of Levitt's Commercial Containers, Inc. ("Levitt's"), a plaintiff in the above-captioned action, and I make this affidavit in support of the plaintiff's motion for summary judgment declaring the unconstitutionality of flow control in Oneida and Herkimer Counties under the Commerce Clause of the United State's Constitution.

2. Levitt's is a New York Corporation with its principal place of business located at 867 Route 5 in Utica, New York. Levitt's has been engaged in the collection, transport, processing and disposal of solid waste generated or brought within the Counties of Oneida and Herkimer since 1905 and I have served as Vice-President of the company since early 1985.

3. I am fully familiar with the rules and regulations of the Oneida-Herkimer Solid Waste Management Authority ("Authority") and the flow control laws enacted by Herkimer and Oneida Counties (hereinafter collectively referred to as "Counties"). I am also fully aware of the restrictions imposed on my company with regard to the disposal and/or processing of solid waste.

4. Levitt's is the largest privately owned hauling company in the Counties and 99% of its business comes from customers in the Counties. Levitt's services commercial, residential, municipal, industrial and institutional customers. The mainstay of Levitt's business is construction and demolition debris ("C&D debris").

5. Pursuant to the Counties' flow control ordinances and the Authority's rules and regulations, Levitt's is required to transport its customers' waste to Solid Waste Management - Resource Recovery Facilities ("Facilities") owned and/or operated by the Authority in Oneida County for processing and/or disposal. Accordingly, Levitt's must transport any and all solid waste (excluding recyclables and green waste) collected in the Counties to the Ash Landfill in Rome, New York, the Energy Recovery Facility ("ERF") in Rome, New York or the Authority's Transfer Station in Utica, New York. Recyclables, on the other hand, must be brought to the Authority's Recycling Center in Utica, New York and green waste must be brought to the Authority's Green Waste Compost Facility in Utica, New York (unless it is privately composted).

6. In February 1993, the Executive Director of the Authority, Hans Arnold, contacted me and my brother Andrew and asked us to come to an important meeting. We were not informed at that time what the meeting was about. At the meeting, we were verbally attacked for hauling C&D debris to the Seneca Meadows Landfill in Waterloo, New York. The Seneca Meadows Landfill is located outside the

Counties and is not owned or operated by the Authority. The Authority told us that the shipment of waste, including C&D debris, out of the Counties violated flow control. Because Levitt's is a licensed and permitted facility which can accept C&D debris for the sorting of recyclables, it had always been Levitt's practice -- prior to February 1993 -- to collect C&D debris from its customers, dump it at our facility, sort out the recyclables and transfer the unrecyclable residue or salvage on our transfer trailers to other facilities for further recycling. The Authority did not own or operate a facility with equipment capable of recycling C&D debris so we sent it out-of-County. Because the Authority found that this business practice violated flow control, Levitt's was assessed a fine of $5,000 to each County (for a total fine of $10,000) and was forced to discontinue the shipment of C&D debris to out-of-County sites. While Levitt's paid the first $5,000 of the fine, it has not paid the second installment due to the recent decision in C&A Carbone, Inc. v. Town of Clarkstown, 114 S.Ct. 1677 (1994). I am familiar with this decision which, I understand, struck down a flow control ordinance requiring the delivery of all nonhazardous solid waste within or generated within a town to a transfer station located within that town.

7. Subsequent to Carbone, the Authority agreed that Levitt's did not have to pay the remaining $5,000 fine but they refused to refund the $5,000 portion of the fine Levitt's had already paid. Moreover, they verbally agreed that, from that point on, C&D debris could be hauled to Facilities outside the Counties so long as the C&D debris was being put to a better use than the Authority could put it (i.e., if it was being recycled rather than disposed). This verbal representation has never been reduced to writing nor have the flow control laws been amended to reflect this understanding. In any event, C&D debris cannot be disposed at Facilities located outside the Counties.

8. Also subsequent to the decision in Carbone, a meeting was held between a number of haulers, including Levitt's, the Authority's attorney, Philip Rayhill, and the Authority's Executive Director, Hans Arnold. During this meeting, which I personally attended in December of 1994, the Authority's attorney stated that the Authority still intended to enforce flow control and did not view Carbone as an impediment to such enforcement. The Authority stated that flow control would be enforced and threatened us with fines, penalties and revocation of our permits if we did not deliver waste collected in the Counties to Authority-designated Facilities in the Counties.

9. The Authority has "garbage cops" who follow Levitt's trucks, take pictures and monitor Levitt's disposal and hauling practices to ensure compliance with flow control.

10. But for the flow control restrictions, Levitt's could transport solid waste out of the county and out-of-state for processing and/or disposal at a lower cost than it is incurring at the Authority's Facilities. For example, the Authority charges a minimum of $86.00 per ton of solid waste as its tipping fee, while the Seneca Meadows Landfill in Waterloo, New York charges only $40 per ton of solid waste. The Seneca Meadows Landfill is located approximately 90 miles outside of Oneida County. Accordingly, Levitt's could transport 30 tons of solid waste to the landfill on its transfer trailers at a cost of approximately $90-$100 (or $3.00 to $3.33 per ton). The total cost of disposal at the Seneca Meadows Landfill, therefore, would not exceed $43.33 per ton (inclusive of transportation costs) for a total savings of approximately $43 per ton -- a 50% savings.

11. Moreover, solid waste collected from Levitt's customers in the Counties could otherwise be disposed at landfills in New Jersey, Massachusetts, Connecticut, Pennsylvania, Ohio and as far south as Virginia at a lower

cost that Levitt's now incurs at the Authority's Facilities in Oneida County.

12. For example, a few years ago my company was approached by a landfill operator in Virginia who was willing to transport the waste collected by Levitt's in the Counties by rail to his Virginia landfill at a total cost (inclusive of rail fees) of approximately $55 per ton, which was significantly less than the $88 per ton being charged by the Authority at that time. Because of flow control, Levitt's was not able to pursue or accept this deal.

13. Moreover, the Chambers Development Company, Inc. ("Chambers") owns and operates 15 landfills in the eastern half of the United States, with landfills in Florida, Maryland, Mississippi, West Virginia, Georgia, Virginia, South Carolina and Pennsylvania. Attached hereto as Exhibit A is a company description and a map of landfills sent to me by Chambers in January of this year. Levitt's can dispose of its customers' waste at Chambers' Dauphin Meadows Landfill in Millersburg, Pennsylvania for $32 per ton with additional transportation costs of approximately $9.30 per ton for a total cost of $41.30 per ton. This is fifty-two percent (52%) less than Levitt's must pay to dispose of waste at Authority facilities. Attached hereto as Exhibit B is a Chambers' specification sheet describing the Dauphin Meadows Landfill.

14. Chambers has also offered to allow Levitt's to dispose of its County waste at its Southern Alleghenies Landfill in Hulsopple, Pennsylvania at a cost of $22 per ton. Again, even after transportation costs of approximately $15 per ton are included, Levitt's would save 57% per ton of waste if it could use its transfer trailers to dispose of County waste at this out-of-state landfill. Attached hereto as Exhibit C is a Chambers specification sheet for the Southern Alleghenies Landfill.

15. Attached hereto as Exhibit D is a January 11, 1995 letter to Levitt's from Chambers and two Landfill Disposal Agreements (which were enclosed with the letter) evidencing the disposal costs and terms offered to my company.

16. Indeed, because of flow control, Levitt's can haul waste to the Empire Landfill in Pennsylvania only if it pays a surcharge to the Authority for each hauled ton of waste. But for flow control, Levitt's could haul to this out-of-state landfill without having to pay this extremely high surcharge.

17. The flow control laws also require the shipment of recyclables to the Authority's Recycling Center. The Authority, however, does not pay any sums for the recyclables it receives despite the existence of a strong recyclables market. In other words, recyclables brought to the Recycling Center could otherwise be sold on the open market.

18. The Recyclables market for corrugated cardboard and paper is very strong due in large part to (1) the packaging industry's increased use of corrugated cardboard; and (2) the earthquake disaster in Japan which has created a heavy overseas demand for cardboard and paper because Japan lacks its own raw materials.

19. While flow control as written applies to both residential and commercial recyclables, the Authority has verbally indicated that it will not enforce flow control against commercial recyclables. The Authority has never reduced this understanding to writing nor have the flow control laws been amended to address this issue. Accordingly, the Authority could choose to begin enforcing flow control against both residential and commercial recyclables under the current state of the law. Enforcement against commercial recyclables would significantly impact my company because we bale our commercial recyclables on-site and sell it by the ton to recycling companies.

20. The flow control laws are preventing Levitt's from transporting waste out of the Counties and out-of-state for disposal and/or processing. As a result, the flow control laws are forcing Levitt's to pay excessive tipping fees to the Authority which are above competitive market levels. Some of this cost is, of necessity, transferred to Levitt's customers while the rest of the cost is absorbed by Levitt's, thus impacting Levitt's profit margin on each load of solid waste collected in the Counties.

21. Because Levitt's annually collects approximately 12,000 tons of solid waste from its customers in the Counties, flow control is preventing a significant amount of waste from crossing the Counties' borders and entering the interstate market.

22. There are no processing or disposal Facilities in the Counties other than facilities owned and/or operated by the Authority.

23. Based on the availability of other disposal and processing facilities in New York and out-of-state, all of which have lower tipping fees than the Authority's Facilities, Levitt's does not perceive a need for the construction of a new landfill located in the Counties.

/s/ David N. Levitt
DAVID N. LEVITT

Sworn to before me this
2nd day of June, 1995

/s/ Maureen G. Croop
Notary Public

Maureen G. Croop
Notary Public, State of New York
Qualified in Oneida County
My Commission Expires: Oct. 31, 1995

CHAMBERS

The Company

Chambers Development Company, Inc. is one of the largest environmental service companies in the United States. The company offers a full range of services in the collection, hauling, recycling, transfer and disposal of non-hazardous municipal and residual waste.

With more than 20 years experience, Chambers is a recognized leader in the industry, committed to providing environmentally safe disposal and the highest quality service to its customers at competitive prices. The company has also compiled one of the industry's best environmental records.

Locations

Today, Chambers services approximately 200 municipalities and nearly 28,000 commercial and industrial customers throughout the eastern one-half of the United States.

The company is headquartered in Pittsburgh, PA and has operations in 12 states.

Landfills

Chambers owns and operates 15 landfills: one in Florida, Maryland, Mississippi and West Virginia; two in Georgia, Virginia and South Carolina; and five in Pennsylvania.

The combined permitted capacity of these sites exceeds 118 million tons, and more than 13,000 tons of waste are disposed in them each day.

Collection & Hauling

The company has collection and hauling operations in Atlanta and Cedartown, GA; Lake, MS; Atlantic City, NJ; Charlotte, NC; East Cleveland, OH; Washington, Pittsburgh, Johnstown, Portage, Harrisburg and Easton, PA; Columbia and Orangeburg, SC; and Norfolk and Richmond, VA.

Transfer Stations

Chambers owns or operates ten transfer stations: four in New Jersey – two in Morris County, one in Hunterdon County and Atlantic City; two in Richmond, VA; and one in East Cleveland, OH, Altoona, PA, Norfolk, VA and Fairfield County, SC.

Recycling & Waste-to-Energy

The company provides recycling collection services to thousands of commercial and residential customers. Chambers also owns/operates a recycling facility in Newport News, VA, and a waste-to-energy facility in Hampton, SC.

Revenue

Annual revenues for 1993 approximated $288.5 million.

Stock

Chambers' stock is publicly traded on the American Stock Exchange. The ticker symbols are CDVA for Class A Common Stock and CDVB for Common Stock.

The Quality *Plus* Choice

CHAMBERS' SYSTEM OF LANDFILLS

CHAMBERS OWNS OR OPERATES 15 LANDFILLS SERVING THE EASTERN HALF OF THE UNITED STATES.

PENNSYLVANIA
- Chambers' Arden Landfill (Washington)
- Chambers' Dauphin Meadows Landfill (Millersburg)
- Chambers' Laurel Highlands Landfill (Cambria County)
- Chambers' Monroeville Landfill
- Chambers' Southern Alleghenies Landfill (Holsopple)

MARYLAND
- Chambers' Mountainview Landfill (Frostburg)

VIRGINIA
- Chambers' Charles City Landfill
- Chambers' Maplewood Landfill (Amelia County)

WEST VIRGINIA
- Chambers' LCS Landfill (Berkley County)

NORTH CAROLINA
- Chambers' Incineration Facility (Hampton)
- Chambers' Oakridge Landfill (Dorchester County)
- Chambers' Richland County Landfill

MISSISSIPPI
- Chambers' Clearview Landfill (Lake)

GEORGIA
- Chambers' Atlanta Landfill
- Chambers' Smyrna Landfill

FLORIDA
- Chambers' Okeechobee Landfill

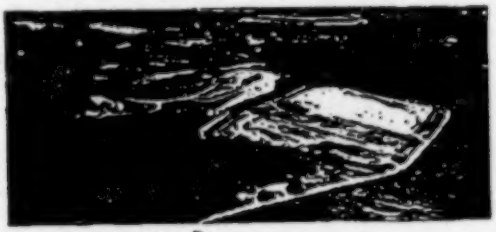
The Quality *Plus* Choice

CHAMBERS' DAUPHIN MEADOWS LANDFILL

Millersburg,
Pennsylvania

LOCATION: Located in Dauphin County, PA approximately 35 miles north of Harrisburg.

MAILING ADDRESS: Route 209, R.D. #1, P.O. Box 68, Millersburg, PA 17061
PHONE, FAX: 717-362-3056 717-362-8642 (FAX)



Aerial view of Dauphin Meadows Landfill

ACREAGE: 51.2 permitted acres – 14.8 acre permitted disposal area.

PERMITTED CAPACITY: 750 tons/day (average) – 1,000 tons/day (maximum).

PERMIT INFORMATION: Pennsylvania Department of Environmental Resources Solid Waste Permit #101539 and several earth and water resource protection permits.
Permittee: Dauphin Meadows, Inc., a wholly-owned subsidiary of Chambers Development Company, Inc.

ACCEPTABLE WASTES: Municipal solid waste, construction/demolition waste, asbestos, and pre-approved, non-hazardous industrial/residual waste such as contaminated soil, processed medical waste and sludges.

UNACCEPTABLE WASTES: Free liquids and hazardous waste.

HOURS OF OPERATION: Monday - Friday 6:15 a.m. - 4:00 p.m.
Saturday 7:00 a.m. - 11:00 a.m.
Flexible hours are available.

The Quality *Plus* Choice

CHAMBERS' DAUPHIN MEADOWS LANDFILL

SECURITY: Single access point with video camera and perimeter fencing, random inspections of incoming loads. Special waste verification lab on-site.

LINER SYSTEM: 60 mil HDPE primary liner with bentonite matting, 60 mil HDPE secondary liner with six inch compacted soil sub-base.

OTHER ENVIRONMENTAL PROTECTION SYSTEMS: Leachate collection and detection system, 2.2 million gallon leachate storage facility, leachate treated at an on-site treatment facility. Landfill gas monitoring probes surrounding the facility are monitored monthly. Thirteen monitoring wells sampled quarterly.

TRANSPORTATION: Easy truck access via I-81. An affiliated hauling company is available for local collection and transportation services at 717-545-4219.

For additional information call 1-800-333-8813.

The Quality *Plus* Choice

CHAMBERS' SOUTHERN ALLEGHENIES LANDFILL

Holsopple, Pennsylvania

LOCATION: Located in Somerset County, PA approximately 10 miles south of Johnstown.

MAILING ADDRESS: R.D. #3, Box 310, Holsopple, PA 15935
PHONE, FAX: 814-479-2537 814-479-2708 (FAX)

Aerial view of Southern Alleghenies Landfill

ACREAGE: 170 permitted acres – 43.4 acre permitted disposal area.
51.5 acre future expansion of disposal area.

PERMITTED CAPACITY: 2,200 tons/day (average) – 3,300 tons/day (maximum)

PERMIT INFORMATION: Pennsylvania Department of Environmental Resources Solid Waste Permit #100081, and several earth and water resource protection permits. Permittee: Southern Alleghenies Disposal Service, Inc., a wholly-owned subsidiary of Chambers Development Company, Inc.

ACCEPTABLE WASTES: Municipal solid waste, construction/demolition waste, asbestos, and pre-approved, non-hazardous industrial/residual waste such as contaminated soil, processed medical waste and sludges.

UNACCEPTABLE WASTES: Hazardous waste and free liquids.

HOURS OF OPERATION: Monday - Friday 8:00 a.m. - 4:00 p.m.
Saturday 8:00 a.m. - 12:00 p.m.
Flexible operating hours available.

CHAMBERS The Quality *Plus* Choice

CHAMBERS' SOUTHERN ALLEGHENIES LANDFILL

SECURITY: Single access point with video camera, natural barriers with perimeter fencing, and random inspections of incoming loads. Full-time local township waste inspector. Special waste verification lab on-site.

LINER SYSTEM: Two 60 mil HDPE synthetic liners over six inch compacted soil sub-base.

OTHER ENVIRONMENTAL PROTECTION SYSTEMS: Leachate collection and detection systems; leachate treated at on-site treatment facility. Landfill gas managed via a network of 42 monitoring probes around perimeter of site. Landfill gas is extracted and piped to a ground flare station where it is destroyed. Twenty-three groundwater monitoring wells surrounding the site and four surface water points are tested quarterly.

TRANSPORTATION: Easy truck access to the site via SR 219. Rail transportation of waste can also be arranged. Unloading capabilities for boxvans. An affiliated hauling company is available for local collection and transportation service at 814-479-4011.

For additional information call 1-800-333-8813.

The Quality *Plus* Choice

CHAMBERS
DEVELOPMENT COMPANY, INC.
Environmental protection. Service. Value

January 11, 1995

Mr. David Levitt
Levitt's Commercial Containers, Inc.
867 Route 5
Utica, NY 13502

SUBJECT: **Landfill Disposal Agreement**
Municipal Solid Waste - Oneida County, CT

Dear Mr. Levitt:

Thank you for your interest in Chambers Development Company, Inc. to dispose of Municipal Solid Waste. Enclosed are two Landfill Disposal Agreements for your review and signature.

Our Special Waste sales department is responsible for selling landfill disposal capacity to generators of such wastes as contaminated soils, ash, sludges, or other non-hazardous industrial wastes. Our double-lined landfills in Pennsylvania, Maryland, West Virginia, and Virginia provide an environmentally safe disposal for non-hazardous industrial wastes - an excellent alternative to costly hazardous waste sites and unsafe local dumps. We are also able to arrange for transportation of this waste to our sites upon Customer request.

Our permits require that we have a fully-executed Landfill Disposal Agreement on file prior to acceptance of waste at our landfills. Upon receipt of the signed Disposal Agreement, I will obtain the proper Chambers approvals and see that a copy is returned for your records. Also enclosed for your completion is a credit application, which must be completed and returned to me at your earliest convenience.

We look forward to your business. If you should have any questions or require additional information, please contact Mike Greenfield at 914/328-2895 or myself at 800/333-9915. Thank you.

Sincerely,

Nancy L. Moses
Inside Sales Representative

Enclosure

cc: Mike Greenfield
klagrw

CHAMBERS

LANDFILL DISPOSAL AGREEMENT
NON-HAZARDOUS WASTES

COMPANY:

Dauphin Meadows, Inc. Landfill
R.D. 1 Route 209
Millersburg, PA 17061

Contract Number: 0798

CUSTOMER:

Company Name: Levitt's Commercial Containers, Inc.

Address: 867 Route 5 Tax I.D. No.

City: Utica State: NY Zip: 13502 County: Oneida

Contact: David Levitt Telephone: 315/726-0026 315/726-4188 P.O. #

1. Solid Waste Disposal. Subject to the terms and conditions contained herein, the Company agrees to accept at its landfill (the "Landfill") Acceptable Waste as defined in Paragraph 2 hereof (collectively, "Waste") delivered by Customer.

2. Acceptable Waste. The following types of waste are the only types of waste which the Company will accept at the Landfill, and Customer agrees that it shall not dispose of any waste not specifically listed below:

(a) Municipal Solid Waste (c)

(b) (d)

Acceptable Waste specifically excludes hazardous, explosive, highly flammable, infectious, pathological, radioactive, municipal, toxic or illegal waste, as defined under any applicable law or regulation. No waste other than those types specifically provided for herein, will be acceptable for disposal at the Landfill. In addition, all Waste delivered to the Company for disposal must conform to all applicable federal, state and local laws, regulations, rules and orders relating at any time to the transportation and disposal of Waste.

3. Rates for Disposal.

Type of Waste	Volume	Rate	Type of Waste	Volume	Rate
MSW	22 tons/day	$32.00 per ton	* Contract may begin 3/01/95 pending completion of landfill expansion.		

County and State of Origin of Waste: Oneida, NY Disposal Quantity (per week): 110 tons

4. Term of Agreement. This Agreement is effective for twelve (12) months, commencing 3/01/95 *. The disposal rates herein may be adjusted by the Company upon thirty (30) days' prior written notice.

COMPANY AND CUSTOMER IN CONSIDERATION OF THE MUTUAL OBLIGATIONS CONTAINED HEREIN, AGREE THIS IS A LEGALLY BINDING AGREEMENT WHICH IS SUBJECT TO THE TERMS AND CONDITIONS ON THE REVERSE SIDE OF THIS DOCUMENT.

Customer	Company
Levitt's Commercial Containers, Inc.	Dauphin Meadows, Inc. Landfill
	Randy Sylvester
	General Manager

FOR COMPANY USE ONLY

Cust. # Region Unit 9027/NH LC Type Interest (y/n)

Credit Limit Remittance Code Alpha Sort

Contract Review Reason

LANDFILL - WHITE CUSTOMER - PINK YELLOW GREEN

LANDFILL DISPOSAL AGREEMENT
NON-HAZARDOUS WASTES

CHAMBERS

COMPANY:
Southern Alleghenies Disposal Service, Inc.
R.D. 3, Box 310
Valley View Drive
Hollsopple, PA 15935

Contract Number: 0797

CUSTOMER:

Company Name: Levitt's Commercial Containers, Inc.

Address: 867 Route 5 Tax I.D. No.

City: Utica State: NY Zip: 13502 County:

Contact: David Levitt Telephone: 315/724-0024 315/724-6188 P.O. #

1. Solid Waste Disposal. Subject to the terms and conditions contained herein, the Company agrees to accept at its landfill (the "Landfill") Acceptable Waste as defined in Paragraph 2 hereof (collectively, "Waste") delivered by Customer.

2. Acceptable Waste. The following types of waste are the only types of waste which the Company will accept at the Landfill, and Customer agrees that it shall not dispose of any waste not specifically listed below:

(a) Municipal Solid Waste (c)

(b) (d)

Acceptable Waste specifically excludes hazardous, explosive, highly flammable, infectious, pathological, radioactive, residual, toxic or illegal waste, as defined under any applicable law or regulation. No waste other than those types specifically provided for herein, will be acceptable for disposal at the Landfill. In addition, all Waste delivered to the Company for disposal must conform to all applicable federal, state and local laws, regulations, rules and orders relating at any time to the transportation and disposal of Waste.

3. Rates for Disposal.

Type of Waste	Volume	Rate	Type of Waste	Volume	Rate
MSW	22 tons/day	$22.00 per ton			

County and State of Origin of Waste: Oneida, NY Disposal Quantity (per week): 110 tons

4. Term of Agreement. This Agreement is effective for twelve (12) months, commencing 1/12/95. The disposal rates herein may be adjusted by the Company upon thirty (30) days' prior written notice.

COMPANY AND CUSTOMER IN CONSIDERATION OF THE MUTUAL OBLIGATIONS CONTAINED HEREIN, AGREE THIS IS A LEGALLY BINDING AGREEMENT WHICH IS SUBJECT TO THE TERMS AND CONDITIONS ON THE REVERSE SIDE OF THIS DOCUMENT.

Customer

Levitt's Commercial Containers, Inc.
SIGNATURE (AUTHORIZED REPRESENTATIVE)

NAME (PLEASE PRINT)

TITLE

DATE

Company

Southern Alleghenies Disposal Service, Inc.
SIGNATURE (AUTHORIZED REPRESENTATIVE)

NAME (PLEASE PRINT)

Paul Kessel
TITLE

General Manager
DATE

FOR COMPANY USE ONLY

Cust. # Region Unit 9927/NM I.C. Type Interest (y/n)

Credit Limit Remittance Code Alpha Sort

Contract Review Reason

LANDFILL - WHITE CUSTOMER - PINK YELLOW GREEN

A-297

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF ONEIDA)

JEFF BLISS, being duly sworn, deposes and says as follows:

1. I am the president of Bliss Enterprises, Inc. ("Bliss"), a plaintiff in the above-captioned action, and I make this affidavit in support of the Plaintiffs' motion for summary judgment declaring the unconstitutionality of flow control in Oneida and Herkimer Counties under the Commerce Clause of the United States Constitution.

2. Bliss is a New York corporation with its principal place of business located at R.D. 2 Hillsboro Road in Camden, New York. Bliss has engaged in the collection, transport, processing and disposal of solid waste generated or brought within the Counties of Oneida and Herkimer since 1948.

3. I am fully familiar with the rules and regulations of the Oneida-Herkimer Solid Waste Management Authority ("Authority") and the flow control laws enacted by Herkimer and Oneida Counties (hereinafter collectively referred to as the "Counties"). Having engaged in the solid waste business in the Counties for the past 47 years, I am aware of the

restrictions imposed on my company with regard to the disposal and/or processing of solid waste.

4. Bliss services residential, industrial, commercial and institutional customers in Oneida and Herkimer Counties. Pursuant to the Counties' flow control ordinances and the Authority's rules and regulations, all waste collected by Bliss from customers in Oneida or Herkimer Counties must be transported to one of the Authority's Solid Waste Management-Resource Recovery facilities ("Facilities") in Oneida County for processing and/or disposal. Accordingly, all solid waste collected in the Counties (excluding recyclables and green waste) must be transported to the Ash Landfill located in Rome, New York, the Energy Recovery Facility ("ERF") in Rome, New York or the Authority's Transfer Station located in Utica, New York. Recyclables, on the other hand, must be brought to the Oneida-Herkimer Recycling Center in Utica, New York while yard or green waste must be brought to the Authority's Green Waste Compost Facility in Utica, New York (unless it is privately composted).

5. The Authority has also verbally stated to me that construction and demolition ("C&D") debris can be brought to the Seneca Meadows Landfill in Waterloo, New York, so long as it is brought there for recycling.

6. The Authority has established tipping fees for the disposal of solid waste and recyclables through the issuance of rules and regulations. The Authority's 1995 Rules and Regulations, which were sent to Bliss by the Authority, state that the 1995 tipping fee for solid waste is $86.00 per ton. A copy of the Authority's 1995 Rules and Regulations is attached hereto as Exhibit A. If witnessed disposal is required or if the solid waste load contains greater that 25 percent recyclables, the tipping fee doubles to $172.00 per ton. The Authority determines whether or not there is greater than 25

percent recyclables by merely eying the waste load and making a discretionary determination.

7. Pursuant to the Authority's 1995 Rules and Regulations, the tipping fee for the disposal of C&D debris is $67.00 per ton at the Transfer Station and $40.00 per ton at the Ash Landfill. The tipping fee increases to $86.00 per ton if the C&D material is mixed in with solid waste and the tipping fee doubles to $172.00 per ton if the C&D material is mixed with greater than 25 percent recyclables. Again, whether tipping fees are increased is within the sole discretion of the Authority and there are no set standards or methods by which to make this determination.

8. The tipping fee for the disposal of C&D debris at the Seneca Meadows Landfill is only $35 per ton (or 48% less than that charged at the Authority's Transfer Station). The tipping fee for the disposal of other solid waste at the Seneca Meadows Landfill is only $40 per ton (or 54% less than that charged at the Authority's Transfer Station). The Seneca Meadows Landfill is approximately 90 miles outside of Oneida County.

9. The Authority's 1995 Rules and Regulations also establish a $10.00 per ton fee for green or yard waste, with a minimum disposal fee of $5.00 per load up to 1,000 lbs. There is no tipping fee for recyclables brought to the Recycling Center, so long as the loads delivered do not contain significant amounts of unacceptable material. Nor does the Authority pay for recyclables received at the Recycling Center despite the value of such materials on the open market.

10. If Bliss was not subject to flow control, it could transport its customers' waste for processing and/or disposal to facilities located both out of the Counties and out-of-state at significantly lower cost. Moreover, it could sell recyclables on the open market for a profit rather than having to dispose of them at the Recycling Center.

11. It costs Plaintiffs $86 per ton of solid waste to dispose of waste at the Authority's Transfer Station, which is operated by Empire Sanitary Landfill, Inc. ("ESL, Inc."). ESL, Inc. subsequently hauls this material from the Transfer Station to its landfill in Taylor, Pennsylvania at a charge to the Authority of $56 per ton. The Authority has advised my company that we can bypass the Transfer Station and haul directly to the Empire Landfill in Pennsylvania but must still pay the Authority a $31 surcharge in addition to the tipping fee charged by ESL, Inc. In the absence of flow control, therefore, Bliss could directly dispose of waste at the Empire Landfill without paying the $31 per ton surcharge. Moreover, instead of paying $86 per ton of solid waste at the Transfer Station, Bliss would only pay $55 per ton at the Empire Landfill plus transportation costs of approximately $15 per ton (for a total disposal fee of $70 per ton) if flow control did not exist.

12. Bliss owns a 23½ ton transfer trailer capable of transporting solid waste from the Counties to out-of-state Facilities. In addition to using these transfer trailers for hauls to the Empire Landfill in Taylor, Pennsylvania and other facilities in the Northeast, Bliss could economically and legally transport C&D debris to Bill Frank, Inc. in Youngstown, Ohio at a disposal cost of $1.80 per yard. One transfer trailer holds 100 yards of C&D debris and it would cost approximately $800 in transportation costs to haul this amount of material to Ohio on our trucks. Accordingly, it would cost $980 to dispose of 100 yards (or 25 tons) of C&D debris in Youngstown, Ohio which is equivalent to $39.20 per ton. This would be approximately 42% less expensive than the cost of disposing of C&D debris at the Authority's Transfer Station 15 miles down the road.

13. While Bliss has a ten year C&D disposal contract with Bill Frank, Inc. which terminates in December of 2002, and is therefore grandfathered from enforcement of the Flow Control Laws pending the existence of the contract, other

haulers do not have such contracts and are, therefore, prohibited from bringing C&D debris to Ohio.

14. I am familiar with the United States Supreme Court's recent ruling in C&A Carbone, Inc. v. Town of Clarkstown, 114 S.Ct. 1677 (1994). It is my understanding that in this case the Supreme Court invalidated a flow control ordinance requiring the delivery of all nonhazardous solid waste within or generated within a town to a transfer station located within that town. Following the Supreme Court's ruling in Carbone, a meeting was held between the Authority and a number of waste haulers, including Bliss. I personally attended that meeting and was advised by the Authority — through its attorney Philip Rayhill and its executive director Hans Arnold — that the Authority still intended to enforce flow control in the Counties and that the Authority did not view Carbone as an obstacle to such enforcement. Indeed, Philip Rayhill, Esq. advised us all that we would not be issued 1995 permits if we refused to bring our waste to the Authority's Facilities.

15. The Authority uses "garbage cops" to monitor activities of haulers — including Bliss — in the Counties to ensure compliance with flow control. The Authority also keeps records of waste disposal practices to ensure compliance. Indeed, on May 31, 1995, the Authority wrote me a letter threatening to "initiate" an action against me for alleged violations of the Oneida Law and the Authority's "own requirements" regarding flow control. A copy of the Authority's May 31, 1995 letter to me is attached hereto as Exhibit B.

16. The flow control laws are preventing Bliss from transporting waste out of the Counties and out-of-state for disposal and/or processing. As a result, the flow control laws are forcing Bliss to pay excessive tipping fees to the Authority which are above competitive market levels. Some of this cost is, of necessity, transferred to Bliss's customers

while the rest of the cost is absorbed by Bliss, thus impacting Bliss's profit margin on each load of solid waste collected in the Counties.

17. There are no processing or disposal facilities in the Counties other than facilities owned and/or operated by the Authority.

18. Based on the availability of other disposal and processing facilities in New York and Pennsylvania, all of which have lower tipping fees than the Authority's facilities, Bliss does not perceive a need for the construction of a new landfill located in the Counties.

/s/Jeff Bliss
Jeff Bliss

Sworn to before me this
7th day of June, 1995
/s/ Beth A. Carle
Notary Public

ONEIDA - HERKIMER SOLD WASTE AUTHORITY

FACILITIES

1995

RULES AND REGULATIONS FOR

ASH LANDFILL

ENERGY RECOVERY FACILITY

GREEN WASTE COMPOST FACILITY

HOUSEHOLD HAZARDOUS WASTE COLLECTION FACILITY

RECYCLING CENTER

TRANSFER STATION

Oneida Herkimer Solid Waste Authority
311 Turner Street - Suite #401
Utica, New York 13501
733-1224

ONEIDA - HERKIMER SOLID WASTE AUTHORITY

FACILITIES

RULES AND REGULATIONS FOR

ASH LANDFILL
ENERGY RECOVERY FACILITY
GREEN WASTE COMPOST FACILITY
HOUSEHOLD HAZARDOUS WASTE COLLECTION FACILITY
RECYCLING CENTER
TRANSFER STATION

GENERAL RULES AND REGULATIONS:

1. All haulers shall obtain a Solid Waste Collection and Disposal Permit from the Authority pursuant to the Oneida and Herkimer County Local Laws. **Permits shall be valid from January 1, 1995 through December 31st of 1996**. No proration of permit fees will occur for permits issued after January 1, 1995. Permit renewal applications must be completed and submitted as soon as possible to insure no lapse in permit.

2. Haulers shall provide all pertinent information regarding their company or municipality, vehicles and routes as required by the Authority Solid Waste and Recyclable Collection and Disposal Permit.

3. Individual companies or businesses which haul solid waste, recyclables generated on their own property and which are not a commercial hauler as defined by County Local Law shall obtain a $ 10.00 permit decal only and the $ 50.00 permit fee will be waived.

4. All vehicles utilizing any facility shall have a readily visible Authority permit decal on the **driver's side**

front bumper. Vehicles without permits will not be accepted at the facility.

5. All haulers are required to follow the instructions given to them by Authority employees or their designee directing the tipping operations. Failure to obey instructions may result in the loss of disposal privileges.

6. There is absolutely no smoking at any of the Authority Facilities. All vehicles should be equipped with spark arresting mufflers.

7. The Authority will not pay for any vehicle damage allegedly caused by poor road conditions or debris in the road, yard or in any of the Authority Facilities.

8. Haulers must deliver all acceptable solid waste and curbside collected recyclables generated within Oneida and Herkimer Counties to an Authority designated facility.

9. Haulers and vehicles must comply with the applicable rules and regulations currently enforced by:

   Oneida and Herkimer Counties
   Oneida-Herkimer Solid Waste Authority (OHSWA)
   NYS Department of Environmental Conservation (NYSDEC)
   NYS Department of Motor Vehicles (DMV)
   NYS Department of Transportation (DOT)

10. Minimum liability insurance coverage of $ 500,000.00 is required for all commercial haulers using the facilities.

11. All vehicles must have their material properly contained or tarped. Vehicles with material not properly contained will be requested by the scale house operators to immediately leave the facility. For front end loaded and rear end loaded trucks, this

means no loose solid waste on the vehicle. For roll off containers, pick up trucks, etc., this means loads must be tarped to contain the material. This is a NYSDEC/NYSDOT and Authority regulation. Loads of residual waste to be transported directly to Empire Sanitary Landfill in Pennsylvania must be tarped or covered according to Pennsylvania DER specifications.

12. The Authority has the right to direct solid waste from the Energy Recovery Facility, the Ash Landfill or Transfer Station to the appropriate facility according to waste production, waste origin, waste type, seasonal fluctuations or planned operating procedures. Every effort will be made to give haulers at least a one day notice if this is to occur.

13. Drivers must **STOP** their vehicles before driving onto the scales. Drivers must obey the respective lights governing scale operations for the entrance to the facility.

14. Drivers must remain in their vehicles while on the scales.

15. All haulers shall properly maintain collection vehicles.

16. All haulers shall allow their waste to be inspected as the material is being dumped.

WASTE HANDLING INFORMATION

General Information:

1. Haulers must provide a completed tracking document from all designated industries, hospitals and nursing homes on that load before the delivery of solid waste to the Transfer Station, Energy Recovery Facility and Ash Landfill.

2. Loads of solid waste delivered at the Transfer Station, Energy Recovery Facility and Ash Landfill that contain, in the opinion of the Authority or their designee, greater than 25% recyclable material will be subject to penalty.

3. Haulers are allowed in the Tipping Floor Area only. General public and haulers are not allowed in the processing area of the facilities without consent of the Plant Manager.

4. Loads of solid waste delivered to the Transfer Station, Energy Recovery Facility and Ash Landfill that contain, in the opinion of the Authority or their designee, unacceptable solid waste, regulated medical waste or hazardous waste will not be accepted.

5. Haulers shall assist the Authority to the maximum extent possible in identifying the generator of hazardous or unacceptable waste if such waste is discovered in their refuse load. Hazardous waste identified as coming from a specific hauler will be returned to that hauler for disposal. This action will also be reported to the NYS DEC.

6. The Authority will require that all Haulers utilize the designated access route patterns to the Transfer Station, Recycling Center and Compost Site as defined below. Truck traffic from areas north, south and west of the Transfer Station will access the facilities via Route 12 to Route 1-790 to Leland Avenue. Trucks from Herkimer County will access the site via Route 5s to North Genesee Street to Wurz Avenue and finally to Leland Avenue. Only local collections vehicles will be allowed on Herkimer Road (Route 5) and Genesee Street south of the Wurz Avenue entrance.

7. Refuse loads, which in the opinion of the Authority contain a majority of waste which is noncombustible, slightly combustible, hardfill, large objects or hazardous waste as defined by the New York State Department Environmental Conservation, will not be accepted at the Energy Recovery Facility. However, if waste is redirected from the Transfer Station to the Energy Recovery Facility during periods of low waste production or operational procedures, solid waste loads with some incompatible material will be accepted. Examples of waste that will not be accepted are construction debris, large pieces of wood and vegetation, and furniture.

8. All container recyclables shall be delivered to the Recycling Center either loose or in see through. plastic bags only. No brown kraft paper bags will be accepted with the containers. All paper recyclables shall be delivered in either brown kraft bags, see through plastic bags or bundled with twine or string. Junk mail should be placed in a see through plastic bags and tied.

9. Green waste accepted at the compost facility is defined as grass, leaves, brush, garden debris and limbs under 12 inches in diameter and no more than 6 feet in length. No other material will be accepted. Absolutely no scrap metal, recyclables or any other material should be delivered to the Compost Site. Loads of material, which in the opinion of the Authority contains non-green waste will be rejected.

10. Compost Site users should deliver material either loose or separated into either brush and limb loads, leaves or grass loads, reasonable mixed loads will be allowed. **Bagged material is not acceptable. No bags should be delivered to the site.**

11. Used motor vehicle tires will be accepted at the Recycling Center in Utica and the Energy Recovery Facility in Rome in accordance with the fees for service resolution dated **12/12/94**.

ONEIDA - HERKIMER SOLID WASTE AUTHORITY CREDIT POLICY

The following is the credit policy updated as of July 1, 1994, that will be in place for disposal of solid waste at all Authority's facilities.

1. The Authority will send the hauler a bill at the beginning of the month for the previous month's disposal. For example: For all solid waste that is delivered to the Transfer Station or ERF during December, a bill will be mailed at the beginning of January.

2. The Authority must be in receipt of this money by the hauler by the 25th of the month following the month of disposal. In the example #1, the money must be received by the Authority by January 25th.

3. If the Authority does not receive the money by the 25th (or next business day if it's a weekend or holiday), the hauler will be assessed an automatic 2% penalty. This penalty will be added to the amount due from the hauler.

4. If the Authority does not receive the money by the 30th of the month, the hauler can be placed on C.O.D. until all monies due to the Authority are paid.

5. If the Authority does not receive all monies by the first week of the month following the month that a penalty is assessed, the hauler can be denied use of any Authority facilities.

FEES FOR SERVICE 1995

The following fees for service was established by the Oneida Herkimer Solid Waste Authority Board according to Resolution # 12 **dated 12/12/94**.

1. Vehicles shall have their disposal fees based on weight of municipal solid waste at the scales of the Transfer Station and Energy Recovery Facility for disposal. Such fees are approved by the Authority annually.

Solid Waste Disposal Fee:

$ 86.00 per ton of solid waste

$ 172.00 per ton of material requiring witnessed disposal.

$ 172.00 per ton for solid waste containing greater than 25% recyclables in a solid waste load.

Construction & Demolition Debris Disposal Fee:

$ 67.00 per ton of material

$ 25.00 per ton of select construction and demolition debris (Also see Ash Landfill Special Conditions)

$ 67.00 per ton of mixed select construction and demolition debris and construction and demolition debris.

$ 86.00 per ton of mixed construction and demolition debris and solid waste

$ 172.00 per ton for mixed construction and demolition debris containing greater than 25% recyclables in construction and demolition debris load.

Virgin Petroleum Contaminated Boil Disposal Fee:

$ 60.00 per ton (all Authority application and analytical requirements must be met prior to the disposal of virgin petroleum contaminated soils)

Residual Waste (as defined by PADER)
Disposal Fee:

$ 86.00 per ton through Authority Facilities

$ 61.50 per ton for loads taken directly to Empire Sanitary Landfill by Hauler.

Recycling Center Fee:

No charge for Residential Recycling

Green Waste Composting Disposal Fee:

$ 10.00 per ton

Tire Disposal Fee:

Up to 16 inch	$1.00 each
700 to 900 series	$2.00 each
900 series to 11.20 series	$5.00 each
Larger series	$.15 per pound
Bulk tires	$100.00 per ton

Add $2.00 per tire if on a rim

Household Appliance Disposal Fee:

$5.00 per item for white goods (i.e. washers, dryers, dishwashers, hot water heaters)

$ 10.00 per item for freezers, refrigerators or any item that contains CFCs.

Minimum Disposal Fee:

$ 15.00 per load of municipal solid waste up to 250 lbs.

$ 10.00 per load of C & D and household furniture (i.e. chairs, couches, mattresses, beds, box springs . televisions, stereo components) up to 250 lbs.

$ 4.00 per 35 gallon bag of normal solid waste

$ 86.00 per truck of material requiring witnessed disposal.

$ 5.00 per load of private company generated green waste up to 1000 lbs. Homeowners will not be charged a minimum disposal fee for green waste.

Used Motor Oil, Oil Filters and Antifreeze:

No charge for Used Motor Oil, Oil Filters & Antifreeze from residents.

Automobile Battery Disposal Fee:

No charge for Automobile Batteries from residents.

Household Hazardous Waste:

No charge for household hazardous waste from residents delivering material to the Household Hazardous Waste Collection Facility. The Facility is open to residents on select Saturdays, April through September, 10 AM to 2 PM

Disposal fees will be charged for acceptable hazardous waste from approved conditionally exempt small quantity generators (CESQG). All CESQG must be approved prior to delivering waste to the Facility. Disposal fees will vary depending upon type & quantity of waste.

Recyclable Material in Loads of Solid Waste:

The solid waste disposal fee for loads of material which in the opinion of the Authority contain at least 25 % recyclable material and which are being delivered for disposal not recycling, shall be $ 172.00 per ton

Solid Waste Contaminants in Loads of Recyclable Material:

The processing fee for loads of material which are being delivered for recycling and, in the opinion of the Authority

contain significant amounts of unacceptable material shall be $ 86.00 per ton.

HOURS OF OPERATION: Effective on 1/02/95 (SUBJECT TO CHANGE UPON NOTICE)

Transfer Station

The normal hours of operation of the Transfer Station are 5:00 a.m. to 4:00 p.m. Monday through Friday, and Saturday 5:00 a.m. to 8:00 a.m. These hours are subject to adjustment to accommodate seasonal changes in garbage production, local haulers and operational considerations. Solid waste will be accepted Monday through Saturday except Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day and New Years Day. No refuse will be accepted on Sundays.

Energy Recovery Facility

The normal hours of operation of the Energy Recover Facility are 8:00 a.m. to 4:00 p.m. Monday through Friday, and Saturday 9:00 a.m. to 1:00 p.m. These hours are subject to adjustment to accommodate seasonal changes in garbage production, local haulers and operational considerations. Solid waste will be accepted Monday through Saturday except Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day and New Years Day. No refuse will be accepted on Sundays. It should be noted the Authority intends to cease incineration of refuse at the Energy Recovery Facility by the end of March 1995.

Ash Landfill (See Special Conditions)

The normal hours of operation of the Ash Landfill are 8:00 a.m. to 3:30 p.m. Monday through Friday. All material that is being directed to this facility must be weighed at the Energy Recovery Facility in Rome no later than 3:00 p.m. The Ash Landfill will not accept any material at that site after 3:30 p.m. Solid waste will be accepted Monday through

Friday except Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day and New Years Day.

HOURS OF OPERATION: Effective on 1/02/95 (SUBJECT TO CHANGE UPON NOTICE)

Recycling Center Facility

The normal hours of operation of the Recycling Center are 8:00 a.m. to 4:00 p.m. Monday through Friday. Recyclables will be accepted Monday through Friday except Thanksgiving Day, Christmas Day and New Years Day. No recyclable material or compost will be accepted on Saturdays and Sundays.

Green Waste Compost Facility

The normal hours of operation of the Green Waste Compost Facility are 8:00 a.m. to 4:00 p.m. Monday through Friday. Green Waste will be accepted Monday through Friday except Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day and New Years Day. The hours of operation are subject to adjustment to accommodate seasonal changes, local haulers and operational considerations. No green waste will be accepted on Saturdays and Sundays from commercial haulers.

Haulers requiring services outside of these time periods must make prior special arrangements with facility management.

Holiday Dates in 1995

New Years Day	Sunday	January 1, 1995
Memorial Day	Monday	May 29, 1995
Independence Day	Tuesday	July 4, 1995
Labor Day	Monday	September 4, 1995
Thanksgiving Day	Thursday	November 23, 1995
Christmas Day	Monday	December 25, 1995

Ash Landfill Special Conditions:

Special Conditions For Disposal of C & D Material At The Ash Landfill Only

A tipping fee of $ 40.00 per ton for C & D material has been established with the following conditions:

1. The C & D material must be delivered to the Oneida County Ash Landfill on Tannery Road in Rome.
2. The vehicle route to the Ash Landfill shall be Rt # 49 through the City of Roma to Oswego Road to Tannery Road.
3. The hauler must be in good standing and have a valid 1995 -1996 Solid Waste Hauling Permit vehicle decal.
4. The hauler must weight-in and out at the Oneida - Herkimer Energy Recovery (ERF) Facility on River Road in Rome.
5. The ERF Scale House hours of operation are from 8:00-AM to 4:00 PM, Monday through Friday.
6. The Ash Landfill hours of operation to receive C & D material will be from 8:00 AM to 3:30 PM.
7. Large demolition protects will require advanced notification to the Authority Office to assist in delivery and scheduling arrangements.
8. 10 Wheel Dump Trucks and Roll off Vehicles are recommended.
9. Due to the limited vehicle maneuvering space, large dump trailers and transfer trailers will also require advanced notification prior to delivery.
10. All vehicles must be properly tarped.
11. Only construction and demolition debris as defined by NYS Department of Environmental Conservation will be allowed of at the Ash Landfill.

12. C & D material shall not contain putrescible solid waste or recyclable material.

13. The C & D material tipping fee at the Transfer Station in Utica will remain at $ 67.00 per ton.

14. C & D material will be accepted at the Ash Landfill contingent on how long disposal capacity is available at that facility.

15. The Authority has the right to close the Ash Landfill due weather or wind problems at that facility without prior notice.

16. Any hauler requiring services outside of these conditions must make prior special arrangements with Authority management.

Ash Landfill Special Conditions:

C & D MATERIAL INSPECTION PROCEDURES

C & D Inspection And Delivery Procedure:

1. The Authority Staff will visually inspect construction and demolition debris waste loads delivered for disposal at the Ash Landfill.

2. If a C & D load contains less than 10 % of non C & D material (in the judgment of the Authority) the load will be charged the applicable C & D rate of $ 40.00 per ton. **This 10 % non C & D material shall not contain any putrescible solid waste or recyclable material.**

3. If a C & D load contains over 10% non C&D material (in the judgment of the Authority) the load will be charged the applicable Solid Waste rate of $ 86.00 per ton. **This 10 % non C & D material shall not contain any putrescible solid waste or recyclable material.**

4. If a C & D load contains over 25 % recyclable material, (such as corrugated cardboard) the load will be charged

the applicable Solid Waste rate for material that contains excessive recyclables of $ 172.00 per ton.

The Oneida - Herkimer Solid Waste Authority will use the New York State DEC Part 360 "Construction and Demolition Debris" Definition to describe Construction and Demolition Debris.

> "**Construction and demolition debris**" means uncontaminated solid waste resulting from construction, remolding, repair and demolition of structures and roads; and uncontaminated solid waste consisting of vegetation resulting from land clearing and grubbing, utility line maintenance and seasonal and storm-related cleanup. Such waste includes, but is not limited to, bricks, concrete and other masonry materials, soil rock, wood wall coverings, plaster, drywall, plumbing fixtures, nonasbestos insulation, roofing shingles, asphalt pavement, glass, plastics that are not sealed in a manner that conceals other wastes, electrical wiring and components containing no hazardous liquids, and metals that are incidental to any of the above. Solid waste that is not construction and demolition debris (even if resulting from the construction, remodeling, repair, and demolition of structures and roads and land clearing) includes, but is not limited to, asbestos waste, garbage, corrugated container board, electrical fixtures containing hazardous liquids such as fluorescent light ballasts or transformers, carpeting, furniture, appliances, tires, drums and containers, and fuel tanks.

ONEIDA - HERKIMER SOLID WASTE AUTHORITY

311 Turner Street Suite 401
Utica, New York 13501
(315) 733-1224

Charles P. Pederson
Chairman
James M. D'Onofrio,
Vice Chairman
Harry A. Hertline, Treasurer
Gerald C. Brodock
R.W. Burrows, Jr.
Louis R. Critelli
Barbara Freeman
David H. Link
Robert McLaughlin
Guy Wilcox. M.D.

Hans G. Arnold,
Executive Director
Jodi M. Tuttle,
Authority Secretary

May 31, 1995

Jeffrey Bliss
Bliss Rubbish Removal Service
RD #2, Hillsboro Road
Camden, NY 13316

Dear Mr. Bliss:

A review of our records indicate that you have delivered no waste on 17 of the last 18 business days and no recyclables on 14 of the last 18 business days. This raises the issue of compliance with various provisions of Oneida County Local Lawn. of 1990 as well as our own requirements.

Before we initiate any action, I would appreciate any explanation you may offer.

Sincerely,

/S/

Hans G. Arnold
Executive Director

HGA/aag

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

AFFIDAVIT

STATE OF NEW YORK)

): ss.:

COUNTY OF ONEIDA)

MARCELLA GUERRIERO, being duly sworn, deposes and says as follows:

1. I am the president of Transfer Systems, Inc. ("TSI"), a Plaintiff in the above-captioned action, and I make this affidavit in support of the Plaintiffs' motion for summary judgment declaring the unconstitutionality of flow control in Oneida and Herkimer Counties under the Commerce Clause of the United States Constitution.

2. TSI is a New York corporation with its principal place of business located at R.D. 2, Dyke Road in Frankfort, New York. TSI has engaged in the collection, transport and disposal of solid waste generated or brought within the Counties of Oneida and Herkimer since 1992.

3. Homestand Land Corporation operates the Greentree Landfill in Toby, Pennsylvania. By letter, dated March 10, 1995, Homestand informed me that it would accept municipal waste from the Counties at the Greentree Landfill for a tipping fee of approximately $26.00 to $30.00 per ton (fees included). A copy of the March 10, 1995 letter is attached hereto as Exhibit A. Even after the inclusion of transportation costs, TSI could transport and/or dispose of

County waste at the Greentree Landfill at a significantly lower cost than is incurred at the Authority's Facilities.

4. I have also received correspondence, dated March 21, 1995, stating that Waste Management, Inc. operates eight landfills in various locations throughout the Commonwealth of Pennsylvania which are available for the disposal of waste from the Counties. Attached hereto as Exhibit B is a copy of the March 21, 1995 letter from Waste Management, Inc.

/S/
MARCELLA GUERRIERO

Sworn to before me this
7th day of June, 1995
/S/[illegible]
Notary Public

HOMESTAND LAND CORP.
GREENTREE LANDFILL
635 Toby Road
Kersey, PA 15848
(814) 265-1744
FAX: (314) 205-6745

March 10, 1995

Ms. Marcella Guerriero
TSI Transfer Station
R.D. #2 Pyke Road
Frankfort, NY 13340

Dear Ms. Guerriero:

Please be advised that Browning-Ferris Industries of Pennsylvania, Inc. is capable of accepting Municipal Waste from Central New York state at our Greentree Landfill. The Landfill is located on Route 219, approximately 10 miles north of Brookway, PA.

The current tipping fee for the Municipal Waste would be $26.00 to $30.00 per ton (fees included), depending on volumes received.

Feel free to call with any questions.

Sincerely,

/S/

Thomas E. Latimer
District Manager

TEL:tmc

Waste Management, Inc.
[address illegible]

March 21, 1995

Ms. Marcella Guerriero
TSI Transfer Station
RD 2 Dyke Road
Frankfort, NY 13340

Dear Ms. Guerriero:

I am writing in response to your request regarding disposal options available to haulers in the Utica, New York area. For your information, Waste Management operates eight (08) landfills in various locations throughout the Commonwealth of Pennsylvania. Disposal rates charged by those landfills vary depending on the market area. If you are interested in disposal options in Pennsylvania, we are available to negotiate a formal disposal agreement with specified rates.

Sincerely,

/S/

Samuel M. Lybrand
Division President - Disposal
Services & Brokerage

SML/cl

cc: Louis Promuto
Greg Sangalls
Ben Victory

ONEIDA - HERKIMER SOLID WASTE AUTHORITY
1600 Genesee Street, Utica, NY 13502
(315)733-1224
web site: http://www.ohswa.org

Board Members

Alfred A. Barbato, Sr., Chairman
Louis R. Critelli, Vice Chairman
Harry A. Hertline, Treasurer
Gerald C. Brodock
James M. D'Onofrio
Barbara Freeman
Donald Gross
Robert McLaughlin
Guy Wilcox, M.D.
David F. Yeaton

Hans G. Arnold
Executive Director
Philip A. Rayhill
General Counsel
Jodi M. Tuttle
Authority Secretary

February 1, 2001

Mr. Richard Lynch
Oneida Indian Nation
579 Main Street
Oneida, NY 13421

Dear Mr. Lynch:

Thanks for taking my call last week. As I thought about our conversation and since I haven't heard from you, I thought I'd take a minute to follow-up.

At the outset, let me say that I have no intent to interfere with any current contract you may have for collection and disposition of waste and recyclables. If you do not now have a contract then I'd hope we could come to a mutually beneficial resolution of your solid waste management needs. If you do have a current contract, I would ask for the

opportunity to discuss some ideas that may be beneficial to the Nation once your current contract concludes.

We are looking for an arrangement with the Nation that is wholly consistent with the Nation's policies to employ environmentally sound practices and utilize local infrastructure where possible.

The Solid Waste Authority is a public benefit corporation created by State law at the request of Oneida and Herkimer Counties to develop infrastructure critical to the long-term health and well being of the local environment. The Authority has made substantial investments on behalf of all residents, businesses and industries of Oneida and Herkimer Counties. This investment has included the regional recycling center, two regional transfer stations, a facility to manage hazardous waste (i.e. paints, pesticides, chemicals), green waste composting, waste audits, industrial residual waste testing and management, and public information.

The Authority receives no funds from the Counties. All the revenues to pay for these facilities and provide for these services come from the fee for disposal of non-recyclable waste.

The development of this system was done on the basis of receiving all the waste and recyclables generated within the two Counties. When waste is taken out of the Authority system it also diverts the revenue needed to operate Authority facilities and services.

From the Nation's perspective, there are some direct benefits to utilizing the Authority system:

1. **Recycling** - The Authority offers the opportunity to recycle more items than any other facility. This can help reduce your costs and help preserve the environment in the long run. We charge $0 for recyclables. If the Nation pays for waste disposal by the ton or cubic yard, recycling can directly reduce your expenses. Also, if the Nation wishes to

directly market high quality items (i.e. office paper) that is no problem. We've done "audits" for over 300 area businesses to identify waste reduction and recycling opportunities, that can improve efficiency and save money.

2. **Environmental Indemnification** - We offer an unlimited indemnification reflecting our highest level commitment to use the best environmental protection systems at our own facilities and those we contract with. Without this indemnification, waste generators are at risk for an enforcement action that may force payment for a cleanup that does not reflect the type or character of waste that generator contributed. Locally, over 600 small businesses, school districts and other generators of regular non-hazardous solid waste were forced to pay for the clean-up of the Ludlow Landfill even though they contributed none of the PCB oils that were the source of the pollution.

3. **Hazardous Waste Management** - The Authority handles problematic wastes such as paints, oil, batteries, light fixtures, pesticides, and other chemicals. The Nation has utilized these services.

4. **Convenience** - Authority facilities are located nearby, (the Western Transfer Station is only 12 miles away on NYS Route 365) thereby minimizing down time for servicing compactor boxes and other waste containers.

5. **Special Services** - We can provide large capacity (100 cubic yd.) walking floor trailers to be live loaded at a demolition job site at a very competitive price of $69 per ton for transportation and disposal.

These benefits can be achieved by the Nation either by a contract with the Authority or by arranging to have your hauler utilize the Authority facilities. If the Nation were to sign a contract with the Authority you would also receive the benefit of being guaranteed the lowest rates in our system and you'd have access to favorable credit terms.

Obviously we are hopeful the Nation will agree to redirect your waste back to the Authority system.

If you are not interested in a contract with the Authority or in redirecting your hauler, I would like an opportunity to offer a collection proposal that may be advantageous to the Nation.

In the final analysis, I hope we can work together to support the commitment made to our region's environmental infrastructure. Thank you for your consideration and I'll call you soon to see if we can discuss these possibilities.

Sincerely,

/S/

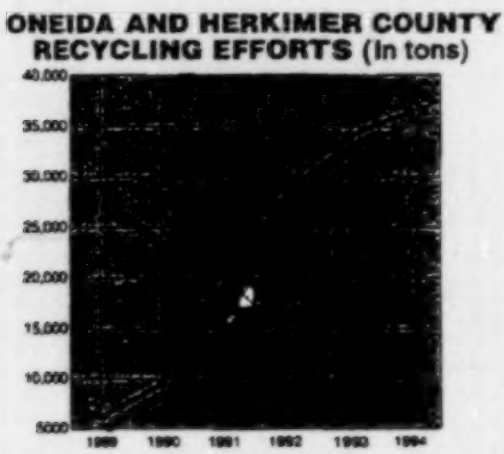
Hans G. Arnold
Executive Director

HGA/aag

ONEIDA - HERKIMER SOLID WASTE AUTHORITY
311 Turner Street Suite 401
Utica, New York 13501
(315) 733-1224

Dear residents and businesses of Oneida and Herkimer Counties,

We would like to share with you some important news about our local solid waste management system. First of all, with the addition of the three new recyclable items announced in the accompanying poster, we can now accept most of your paper products and containers, plus six types of plastic. In addition, household hazardous materials, paint, used motor oil, batteries and tires, yard waste, major appliances, plus construction and demolition debris are accepted at your Recycling Center. To date, we have removed over 133,000 TONS of recyclable material from our waste stream, material which has been processed by private industry and made into new products. Obviously, none of this would be possible if you were not enthusiastic participants.



Secondly, you may have recently heard about a lawsuit filed by the following group of waste haulers: Transfer Systems, Inc., Bliss Enterprises, Inc., Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial Containers, Inc. and Ingersoll Pickup, Inc. Filed against the Oneida-Herkimer Solid Waste Authority, Oneida County and Herkimer County, this action seeks to have a Federal Court overturn our local solid waste management laws. These local laws were the first step in building what has become one of the most successful recycling programs, not only in NY State, but in the entire nation.

Here's how your system works. The fees that haulers pay our local system, and in turn pass on to you for their services, not only cover the cost of landfilling your garbage—a fee competitive with those charged in other areas—but also include the cost of processing your recyclables, plus many other services.

If haulers stop delivering your garbage to our local waste management system, we will no longer receive the funds to support all these services. It's easy to see why everyone needs to participate to make the system work.

YOU

- SEPARATE & SET OUT RECYCLABLES
- SET OUT GARBAGE
- PAY HAULER AND/OR MUNICIPALITY FOR PICKUP

PRIVATE & PUBLIC HAULERS

- PICK UP GARBAGE & RECYCLABLES
- PAY AUTHORITY $86 PER TON

Recycling Center

ONEIDA-HERKIMER SOLID WASTE AUTHORITY

- DISPOSES OF GARBAGE IN LANDFILL
- PROCESSES RECYCLABLES
- GREEN WASTE COMPOSTING
- HOUSEHOLD HAZARDOUS WASTE
- WASTE OIL RECYCLING
- TIRE RECYCLING
- INDUSTRY WASTE AUDITS
- PUBLIC EDUCATION
- ADMINISTRATION

In addition to making recycling a top priority, our local system was also created to ensure the safe management of our solid waste. The individual resident is responsible for his or her garbage not only when they set it out, but also when it is disposed of at a landfill. This is why we were so careful in selecting (through a competitive bid process) the Empire Sanitary Landfill in Pennsylvania to serve the area until a local landfill can be built. The Empire Landfill employs every modern environmental system necessary to protect ground water, people near the landfill, and the environment in general. If waste goes to a landfill which does not employ these protections, there can be serious legal and financial implications if there is an environmental problem in the future. (You may remember that over 600 residents, plus businesses, school districts, villages, towns and cities in Oneida and Herkimer Counties were sued to pay for the clean-up of the privately owned Ludlow Landfill.)

We congratulate community residents, businesses and industries for doing their part to make our system work. We look forward to finding new markets so that we can recycle even more. If you have any questions, please call us.

Sincerely,

/S/
Hans G. Arnold
Executive Director

BOARD OF DIRECTORS
Charles P. Patterson, Chairman
James M. D'Onofrio, Vice Chairman
Harry A. Hertline, Treasurer
Gerald C. Brodock
R. W. Burrows, Jr.
Louis R. Critelli
Barbara Freeman
David H. Link
Robert McLaughlin

File Copy - Property Of:
Oneida-Herkimer Solid Waste Authority
1600 Genesee Street
Utica, NY 13502

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY

DRAFT ENVIRONMENTAL IMPACT STATEMENT IMPACT STATEMENT FOR SITE WLE-5 EAST, A PROPOSED SANITARY LANDFILL IN THE TOWN OF AVA, NEW YORK

January, 1998

* * *

In addition to the findings presented in the Market Profile study, there are a number of other non-cost related reasons for favoring development of the proposed landfill rather than pursuing waste exportation:

- To ensure that environmentally and economically sound long-term landfill disposal capacity will be available to the Oneida-Herkimer region.
- Prior disposal practices at out-of-region disposal facilities and the types of wastes disposed from other sources would expose the Authority (and local waste generators) to environmental clean up costs and risks.
- Many of the potential disposal facilities could only take a portion of the region's waste, and for a varying number of years (due to different permit durations). This would require the Authority to deal on a long-term basis with the management, legal, cost and liability issues stemming from the use of multiple disposal facilities.
- Long-term reliance on waste exportation would mean that most of the dollars collected in tipping fees (approximately $10 million per year) will leave the local economy, thus losing the economic benefits that would be associated with a new local landfill.
- For the foreseeable future, even with the very aggressive recycling programs underway, a significant portion of the region's waste stream will require landfilling.
- When preparing proposals for potential waste exporters, many contact landfills will make the

proposal contingent upon the development of new disposal capacity at their facility that is not yet permitted. This is due to the relatively short term for which landfill permits are typically issued (e.g., five to ten years). A long-term disposal contract with such a facility could be terminated earlier than anticipated if, for some reason, the facility's permit was not reissued. If the Authority operated its own landfill, it would have greater control over the factors and conditions upon which landfill permits are issued.

Draft EIS for Proposed Landfill Site WLE-5 East
Oneida-Herkimer Solid Waste Management Authority
-xv-

* * *

DEPARTMENT OF SOLID WASTE MANAGEMENT
County Office Building
800 Park Avenue
Utica, New York 13501
Tel: (315) 798-4042; Fax (315) 798-5474

Oneida County
John D. Plumley
County Executive

Hans G. Arnold
Commissioner

Memorandum

To: John D. Plumley, Oneida County Executive
Robert F. Julian, Chairman Environmental Conservation Committee
Majority Leader Board of Legislators

From: Hans G. Arnold, Commissioner of Solid Waste Management

Date: January 4, 1989

Re: Long-Term Financial Analysis

As you know, I put together the attached primarily as a method of how future solid waste costs (recycling, waste-to-energy, landfill) will be paid for. A specific objective was to alleviate the County tax burden and get the costs onto a somewhat independent user fee.

The key is, in large part, the early operation of the transfer stations as both centers of waste collection and the places where a single fee can be collected to cover the full range of solid waste costs. I believe this is essential to keep the "up-front" costs of the project off the real property taxes.

A number of issues are raised.

- Can the first year MRF operating budget be amortized with the bond issue as start-up expenses?

- Will the $23 million 1990 Authority revenue bond issue, which is in part to "payback" the County for up front costs, be supportable by flow control and the ability to set a transfer station tipping fee? I believe it will.
- The large bond issues may in fact be staged thus lowering the early year spikes in tip fees.

I have also discussed this with Comptroller Ford and Finance Commissioner Fahy. The numbers on the attached are preliminary. Our consultant engineers and project counsel are in the process of reviewing this. Once that is complete, it will be important to review this with the Authority. Given the magnitude of the financing and the difficult policy decisions which will be forced, I believe that we should consult with a financial advisor and possibly an underwriter at the earliest possible date.

PRELIMINARY ONLY

NOT PUBLIC DOCUMENT

REVENUES

	AUTHORITY	COUNTY
1988		1. GF Payment Against GO Borrowing 2. Tip Fees for ERF & ALF 3. GF Payment for DSWM
1989		1. GF Payment Against GO Borrowing 2. GF Payment for DSWM
1990	Also potential for Revenue Bond issues to "Buy Out" outstanding debt of ERF and ALF.	1. GF Payment Against MRF Operation 2. GF Payments for DSWM
1991		

OBLIGATIONS

	AUTHORITY	COUNTY
1988		$722,000 G.O. * • GIS & Port • Design • Urban Fuel Study $3,000,000 G.O. • ALF Const. • ERF Equip. $3 845 Unit • ERF & ALF Operating Budget $187,603 G.O. • DSWM Administrative Budget
1989	$4,500,301 • ERF & ALF Operating Budget	$1,831,851 G.O. * • Landfill Hydrology • Landfill EIS • Landfill Design • Air Monitoring & Modeling • Health Risk • ERF RFP • Public Info $4,625,400 G.O. * • Landfill Acquisition • MRF Const. & E • Compost • C & D • Transfer Station Design $356,192 • DSWM Administrative Budget
1990	$3,000,000 • ERF & ALF Operating Budget $23,000,000 Revenue Bond Issue • Transfer Station Construction • EIS, Permitting Environmental • Hickory County *	$2,500,000 • MRF Operating Budget $560,000 • DSWM Administrative Budget
1991		$2,800,000 • MRF Operating Budget $3,920,000 • ERF & ALF Operating Budget $556,000 • DSWM Administrative Budget $18,750,000 Revenue Bond Issue • Permits, Contracts, Environmental • Landfill Construction • Waste To Energy Construction

1. Tip Fees for ERF & ALF
2. Repayment to County by Authority

1. Single Transfer Station Tip Fee to include:
   - ERF & ALF Operations
   - MRF Operations
   - Private Landfill Tip Fee
   - DSWM Administration
   - Revenue Bond Payment

BEST AVAILABLE COPY

JOHN D. PLUMLEY
Oneida County Executive
County Office Building
800 Park Avenue, Utica, NY 13501
Phone: (315) 798-5800

November 7, 1988

Re: Contractual Relationship Between the Counties and the Oneida- Herkimer Solid Waste Management Authority.

GENERAL

The Counties and Authority should make a mutual good faith pledge to develop the most environmentally sound and most economical system of facilities that are fair and equitable to all parties.

The Authority should provide the Counties – the County Executive, Chairman of the Board, appropriate legislative committees and County Administrator – with full and regular status reports regarding planning activities, construction schedules, bid schedules and results, facility performance, financing, projected budgets, projected fees and other related information and activities of the Authority. At the start, I believe this reporting should be done monthly. Once facilities are fully operational, quarterly reports may be adequate. In any case, the requirements for such reporting should be considered for inclusion in the contract.

While such reporting and close coordination is essential, the prior approval by the Counties of these items should not be required or in the contract. Prior counties approval would defeat the benefit of creating a more efficient means for administering and implementing the project. The Authority is the official means for joining the two counties and it creates a Board to make decisions and take action. More importantly, such requirement for prior approvals could be a real impediment to the Authority's financing capability. The

Authority law specifically states that the Authority bonds shall not be the debt of the County. Prospective bond purchasers could balk at an arrangement where such duplication of approvals were contractually required.

WASTE COMMITMENT/ FLOW CONTROL

The Authority Law empowers the Authority to develop the necessary solid waste management facilities. The ability to finance and then operate these facilities depends upon the legal commitment of the waste. This essential responsibility rests with the Counties and its exercise ultimately controls the project.

The contract should include an agreement by the Counties to direct solid waste, recyclables, and all waste material under its jurisdiction pursuant to the flow control provision of the law to the facilities of the Authority.

Since these facilities will not come on line simultaneously, the contract should provide far the counties' waste commitment on a segmented basis. The counties can agree to enact or amend laws, ordinances or regulations to accomplish this purpose.

The Authority should be obligated to provide facilities at the earliest feasible dates, which should follow the schedule developed in the ongoing work by the Department of Solid Waste Management and the counties' consultants.

SITES

To insure that the critical work started by the Counties is carried forward in the manner now underway, the Authority should be required to use and follow the site evaluation and selection procedure approved by the counties. Any modifications to this procedure would require formal prior approval by both Counties. The contract should not restrict or amend the powers of the Authority to identify sites, enter the sites for detailed study, acquire the sites, and develop the facilities.

PERMITS

The contract should require the Authority or its contractee to obtain and fully maintain all required State and Federal permits. The Authority should be contractually required to comply with County requirements such as the "state-of-the-art" resolution. Documentation of this should be given to the Counties.

The Authority should be required to report on a regular basis to the counties regarding compliance with all permits, conditions, and approvals for all facilities and programs.

The Authority should assume lead agency status and all State Environmental Quality Review Act responsibilities from the Counties.

EXISTING FACILITIES

The contract should provide for the Authority to assume responsibility for the operation and ownership, if possible, of the existing County solid waste management facilities: the Oneida County Energy Recovery Facility (ERF) and the Ash Landfill. This responsibility should include the day-to-day operation of receiving and processing waste, production of energy, operation of all equipment and vehicles, and related activities. It should also include the responsibility to meet the outstanding debt, and the obligations for principal and interest payments.

It is essential that solid waste be managed by a single entity. This will make solid waste management more efficient and effective. Oneida County's initiative has created a relatively secure and inexpensive means of disposal for part of the waste stream for part of the County. However, in the future even the existing facilities will need major renovation to continue operation. The Ash Landfill has five years of capacity and expansion at Tannery Road will not be allowed by State. The ERF depends on an approved landfill for ash disposal. Therefore, its long term viability is directly

dependent on the success of ongoing efforts to site and develop new landfill. Major air pollution control improvements and other retrofits are being mandated for the ERF by the State. These existing facilities must be an integrated part of plans for new facilities and one entity, the Authority, should be responsible for the development and coordination of such plans. There are existing waste supply contracts, energy contracts, operating permits, and outstanding bonds all of which must be addressed to insure that no contractual conflicts are created.

The contract provision for dealing with existing facilities may need to be phased. The first phase may be an arrangement whereby the Authority would assume operations and financial obligations on behalf of the County. For example, part of the disposal fees would be paid to the County to meet the principal and interest obligations. If it is legally allowable under the standing bond issues, the contract should provide for the transfer of the outstanding debt on the ERF and Ash Landfill. Obviously, title to the associated properties should also be transferred.

EXISTING EMPLOYEES & SERVICES

The Authority Law provides for the Authority to retain all necessary employees and for the transfer of existing employees at the approval of the Counties. This transfer should occur as soon as the Board of Directors is fully functioning. I would anticipate this to be in early 1989. The Counties will still have some responsibility for staff and consultants by providing funds for salary and support until the Authority facilities can support the staff through its fee structure. The existing operating staff for the ERF and Ash Landfill are currently fully paid by the disposal fees and this can continue with the Authority assuming full responsibility.

Coordination and provision of certain services are provided to the Department of Solid Waste Management by other Departments such as Audit and Control, Planning, Personnel,

Finance, Compensation, Law, Purchasing, Central Services, and Public Works. Until a review can be completed jointly between the Authority and the Counties, these interdepartmental service arrangements should continue to function as they do currently.

BOARD OF DIRECTORS

This Board will be required to devote an extensive amount of time and effort to the function of the Authority. They will be siting, financing and building several multi-million dollar facilities. They will be called on to exercise prudent judgement after careful study of the issues and recommendations. I expect it will require at least 25-30 meetings annually. I would recommend that the members receive an appropriate per diem for all regular and special meetings in addition to reimbursement for expenses. The Authority chairman should be compensated at an appropriate rate commensurate with his responsibility per meeting plus expenses. Great care has gone into the development of the Authority and the appointment of its members. It will be, in essence, a corporate board of directors with a very high level of responsibility.

The Cost of Flow Control

Prepared by:
Mark P. Berkman
National Economic Research Associates
One Front Street
San Francisco, CA 94111
(415) 291-1000

Prepared for:
Browning-Ferris Industries
NERA Consulting Economists

May 3, 1995

The Cost of Flow Control

I. INTRODUCTION AND SUMMARY

Congress is currently considering legislation to enable local governments to designate the destination of municipal solid waste generated within their jurisdictions—often referred to as flow control—in response to a recent U.S. Supreme Court decision, *C.A. Carbone, Inc. v Town of Clarkstown, New York* which effectively prevents local governments from imposing such controls. Browning Ferris Industries (BFI) and many other members of the solid waste industry, as well as some local government officials, are concerned that while flow controls may have been justified in some circumstances, unrestricted application of such controls in the future will discourage competition and impose substantial costs on consumers. Based on this concern, BFI retained National Economic Research Associates (NERA) to estimate the costs imposed by flow control on consumers.

NERA conducted an econometric study of disposal charges (tip fees), relying on data for over 4,000 waste management facilities (landfills, incinerators and transfer stations) collected by Chartwell Publishing, to determine

whether flow controls increase disposal costs, and if so, by how much.[1] NERA found that flow controls increase disposal costs on average of $14 per ton or 40 percent. More specifically, NERA found:

- Flow control adds approximately $10 per ton or 33 percent to the average landfill disposal charge (tip fee) nationwide.
- Flow control adds approximately $11.50 per ton or 23 percent to the average incinerator disposal charge (tip fee) nationwide.
- Flow control adds approximately $14 per ton or 33 percent to the average transfer station disposal charge (tip fee) nationwide.

These results are summarized in Table 1 and Figure 1.

NERA also conducted several case studies and reviewed case studies conducted by other organizations. These studies provided further support for the conclusion that flow control increases disposal costs.

These findings are not surprising. Flow control is generally made necessary precisely because waste would otherwise be shipped elsewhere to save on disposal costs. Consequently, unless there are benefits associated with flow control which exceed the higher disposal costs, flow control cannot be justified on economic grounds. Flow control proponents have not identified benefits of this magnitude aside perhaps from protecting existing local government financial obligations associated with waste management facilities built assuming flow control. The U.S. Environmental Protection Agency's (EPA) recent report to Congress on flow control, for example, did not find controls necessary to achieve public health and environmental goals.

---

[1] Chartwell publishes the Solid Waste Price Digest, the most comprehensive disposal charge record available.

The remainder of this report is organized as follows. Section II presents a brief background on the flow control debate. Section III explains the methodology and data used in the econometric analysis. Section IV presents the results of the analysis. Section V reviews the case study evidence. Appendix A provides additional detail on the results of the econometric analysis. Appendix B describes NERA's qualifications.

II. BACKGROUND

Flow control refers to local laws by which local governments direct that the municipal solid waste (including residential, commercial and industrial) generated within their jurisdictions be disposed of and/or processed at designated facilities. Local governments have been imposing such controls since at least the early 1970's, principally for two reasons—to protect sizable investments in waste facilities and to generate fee revenues to finance solid waste programs. Many local governments built and/or financed large scale waste management facilities which require substantial minimum waste flows to cover costs. Many of these facilities, for example, are resource recovery plants which operate under contracts to provide steam for industrial processes and electricity generation. Some of these plants would not be economic without these contracts, and the contracts require that they provide a specific amount of steam requiring a specific amount of waste. Consequently, local governments need to direct waste to these plants to protect their investments. In fact, according to the *Resource Recovery Yearbook* about 48% of the resource recovery plants constructed since 1964 benefit from flow controls.[2] More recently, local governments have financed and built transfer stations and material recovery facilities. These facilities, especially the latter, also require substantial waste flows to be economic. Public landfills have been less reliant

---

[2] Another 47 guarantee sufficient waste flow via contracts.

on flow controls, although economies of scale may encourage larger facilities. Some local governments also have turned to flow control to generate fee revenues often used to finance waste management programs such as recycling and household hazardous waste. Without flow control, waste generators could avoid such fees by turning to alternative disposal options in other jurisdictions.

AVERAGE TIP FEE WITH AND WITHOUT FLOW CONTROL

Across All Types of Facilities

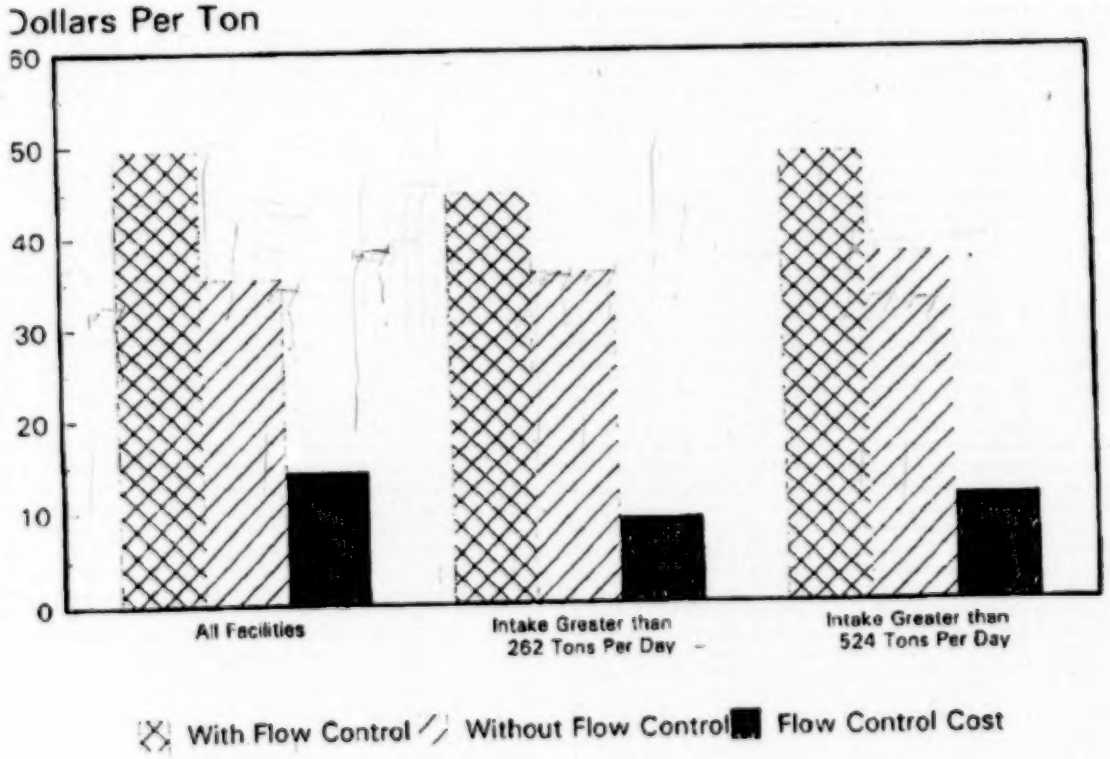


FIGURE 1

TABLE 1

AVERAGE TIP FEE WITH AND WITHOUT FLOW CONTROL

Across All Types of Facilities (Landfills, Incinerators, Transfer Stations)
($/ton)

	All Facilities	Facilities With Intakes Greater Than 262 Tons Per Day	Facilities With Intakes Greater Than 524 Tons Per Day
(1) Average Tip Fee With Flow Control	$49.49	$44.71	$48.92
(2) Average Tip Fee Without Flow Control	$35.31	$35.85	$37.76
(3) Flow Control Cost	$14.18	$8.86	$11.16
(4) Percent Increase in the Average Tip Fee With Flow Control Due to Flow Control [Row (3) ÷ Row (2)]	40.16%	24.71%	29.57%

Notes and Sources

These values are based on a regression analysis of tip fees using data from Chartwell Information Publishers. Browning-Ferris Industries identified which facilities are subject to flow control. Population density data is from the U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States: 1993*, (113th edition.) Washington, DC, 1993, Table No. 31. The values presented are mean values determined by the following equation: tip fee= f(mean state population density, existence of flow controls). The mean population density for all facilities is 193.025 persons per square mile. For facilities whose intake is greater than 262 tons per day, it is 201.681 persons per square mile. For facilities whose intake is greater than 524 tons per day, it is 235.868 persons per square mile.

Observations are further restricted to facilities which have tip fees greater than 0 and remaining capacity greater than 1 year.

Although flow controls have been imposed for over 20 years, they have only recently become a serious concern as the variety and accessability of alternatives has increased. The private sector responded to rapidly rising disposal costs in the mid-1980s to the early 1990s by building more disposal capacity. While the number of landfills in the U.S. has dropped rather dramatically, landfill capacity has not. In fact, capacity has been increasing in many regions of the country.[3] As a result, disposal charges are no longer increasing, but rather falling as disposal facilities compete for business. In addition, the disparity has been exacerbated by local governments relying on flow control to finance recycling and other waste management programs. Local governments have imposed fees and surcharges at flow control facilities. Third, some governments became more aggressive regarding flow control as waste streams diminished at least in part because of government regulations and programs. Paper recycling, for example, has eliminated an important fuel stock from resource recovery plants.

The costs imposed by flow control have led to a series of lawsuits primarily by private haulers against local governments. The U.S. Supreme Court has heard several of these cases, finding in each instance that flow controls violated the Constitution's commerce clause. The Court's most recent decision, *C & A Carbone, Inc. v. Town of Clarkstown, New York (No. 114 S. Ct. 1677 (1994))*, has prompted flow control proponents to petition Congress for relief. Proponents contend that flow control is necessary to protect the financial obligations that many local governments have made. Proponents also contend that because local governments must by law provide solid waste services, they must also be empowered to control the flow of waste.

---

[3] See, for example, U.S. EPA, "Flow Controls and Municipal Solid Waste," Report to Congress, March 1995, EPA530-R-95-008.

Following this argument, each local jurisdiction must be responsible for the waste generated within its borders.

While opponents have emphasized the cost of flow control, there has been surprisingly little analysis done to demonstrate this. The available evidence is largely anecdotal—case studies showing the availability of low cost alternatives to waste generators currently restricted by flow control. Although these case studies are useful, there has been no broad-based study to establish the magnitude of the costs imposed by flow control. BFI retained NERA to address this gap.

III. ECONOMETRIC METHOD USED TO ESTIMATE THE COST OF FLOW CONTROL

A. Method

We relied upon a statistical technique referred to as multiple regression analysis to measure the impact of flow control on tipping fees.[4] This technique enables us to isolate the impact of flow control from other factors which influence tipping fees. The multiple regression analysis was performed in three steps. First, the relevant variables were identified and the relationship expected between the dependent and independent variables was determined.[5] Second, data on the variables were obtained. In this case, data on tipping fees by technology, facility ownership, facility site and population were obtained. Third, the specific relationships among the variables were examined through the use of multiple regression analysis.

The regression technique is best demonstrated by an examination of how it is used to estimate the relationship between a single independent variable and a dependent variable. For example, regression analysis may be used to estimate the relationship between landfill tipping fees and population density. As a first step, the analyst determines how he or she expects the variables to relate. This would lead to specifying a regression equation which could be written as:

$$\text{Tipping Fee} = b_0 + b_1 \times \text{population density} \quad \text{(eq. 1)}$$

The symbols b_0 and b_1 are called "coefficients." The b_0 coefficient (also known as the "intercept term") represents

---

[4] For a detailed explanation of regression analysis, see, for example, R. Pindyck and D. Rubenfeld, Economic Models and Economic Forecasts, Third Edition, McGraw Hill, 1986.

[5] For expositional convenience, the variable for which one is interested in making an estimate in regression is referred to as the dependent variable and the determinants of the dependent variable as the independent variables.

attendance with no population (although, in fact, of course, there is always population). The b_1 coefficient represents the value of the effect on tipping fee of an increase in population density of one unit (one more person per square mile in this example).

The second step is to obtain data for a sample of tipping fees and population densities. Figure B-1 is a graph of the observations for a hypothetical sample of such data. The vertical axis in this graph describes tipping fee, the horizontal axis describes population density and each of the data points (the triangles) in the graph indicates a single observation of tipping fee and population density. From this scatter diagram it is evident that, while there is considerable dispersion to the points, there is generally a direct relationship between tipping fee and population density-the greater the population density, the greater the tipping fee.

The third step is to establish a more precise relationship between population density and tipping fee. Through regression analysis, a line can be estimated which describes the average relationship between tipping fee and population density—a line that best "fits" the pattern of data points. Such a regression line has been plotted in Figure 2. The "best fit" line can then be described in equation form. For example, the data in Figure show that the line of best fit is as follows:

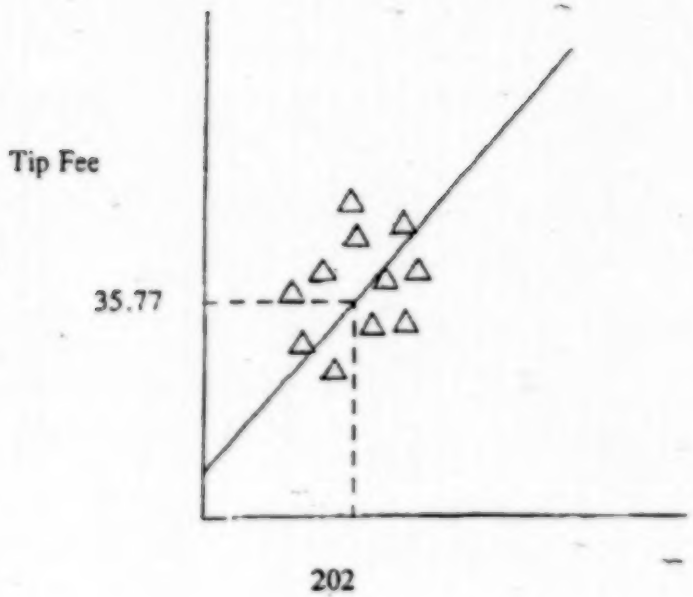
$$\text{Tipping Fee} = 25.67 + 0.05 \times \text{Density} \qquad \text{(eq.2)}$$

The 25.67 corresponds to the b_0 coefficient and represents the expected tipping fee from the hypotheticai sample transactions without accounting for the effect of density. The 0.05 corresponds to the b_1 coefficient and indicates that for every additional unit of density, tipping fee increases by 0.05 dollars per ton. For example, the equation predicts that with a population density of 202, tipping fees would be $35.77.

FIGURE 2

The Relationship Of Tip Fee And Density

Tip Fee = 25.67 + .05 * Density



Using the regression coefficients, one can estimate the value of the dependent variable for any actual or hypothetical combination of independent variables. To make such an estimate, one multiplies the values of the independent variables by the respective regression coefficients, sums the result and adds the regression coefficient representing the intercept (b_0). For this study, we examined the impact of flow control on tipping fee by specifying the following equation:

$$A_t = b_0 + b_1X_1 + b_2x_2 + b_n+_1X_n+_1 +E \quad \text{(eq.3)}$$

Where A_t represents the tipping fee by disposal technology (landfill, incinerators and transfer station), the b's represent the regression coefficients to be estimated and the x's represent various characteristics or factors we expect to affect tipping fees. E represents the unexplained error. These characteristics include population density, facility ownership (public or private), facility operator (public or private), daily capacity, location (state, census region, etc.), and the presence of flow control. Population density serves as a proxy for several factors which are likely to have a positive impact on tipping fees. High density will reflect higher demand for disposal and higher land costs. Fees may also vary by facility ownership. Public facilities may be lower cost because of lower cost financing or subsidized rates. Public or private management may also affect fees, although the direction of the impact is unclear. Location may also affect fees, reflecting differences in regulation or local fees and taxes. Finally, based on the preponderance of anecdotal evidence reviewed and the perceived need for flow control to keep waste local, we expect flow control to have a positive effect on tipping fees.

B. Data

We relied on tipping fee data collected by Chartwell Publishing for publication in the *Solid Waste Price Digest.* Chartwell surveys disposal facilities on a regular basis-as frequently as monthly for large facilities. This data identifies over 4,000 facilities by name, location, facility type (landfill, incinerator and transfer station), ownership, operator (public or private) and tipping fee. We relied on fees updated during the first quarter of 1995. Chartwell did not identify which facilities operated under flow control. We collected this information with the assistance of BFI regional managers. We confirmed the presence of flow control at incinerators by reference to the *Resource Recovery Yearbook, 1993 Edition.* The share of incinerators reported to have flow control was 48 percent compared to the Yearbook's 43 percent. The presence of flow control at landfills and transfer stations was more difficult to confirm. The share of landfills and transfer stations with flow control, however, appear reasonably consistent with the shares reported by U.S. EPA in its report to Congress on flow control. EPA reported that landfills did not frequently rely on flow control. Our data showed that about 13.5 percent of landfills had flow control. EPA reported that about 19 percent of materials handled by MRFs were subject to flow control. Our data indicated that about 29 percent of the transfer facilities (many of which presumably are MRFs) were subject to flow control.

The *Resource Recovery Yearbook* also provided us with an alternative data set for incinerator tipping fees. These data were used to confirm the results based on the Chartwell price and BFI supplied flow control information.

IV. RESULTS

The regression analysis conducted on the data described above demonstrated that flow control has a statistically significant positive impact on tipping fees. This finding holds regardless of density, ownership, operator, size

and technology. On average, flow control adds $14 per ton to tipping fees or a 40 percent increase. Note that this does not mean that flow control always results in higher fees, but that on average, one would expect higher fees if flow control were imposed.

Table 2 and Figure 3 summarize the results for landfills. Regressions were run accounting for landfill daily capacity or intake. As shown, flow control adds about $10 per ton across all landfill sizes, and between $4 and $6 if we restrict the analysis to larger landfills.

Table 3 and Figure 4 summarize the results for incinerators. Regressions were run accounting for incinerator daily capacity. As shown, flow control adds about $11.50 per ton to tipping fees across all incinerator sizes and between $7.40 and $13.25 for large facilities.

Table 4 and Figure 5 summarize the results for transfer stations. Regressions were run accounting for transfer station daily capacity. As shown, flow control adds about $14 per ton to transfer stations across all sizes and between $12.17 and $16.38 if we restrict the analysis to larger transfer stations.

TABLE 2

AVERAGE LANDFILL TIP FEE

With and Without Flow Control

($/ton)

	All Facilities	Facilities With Intakes Greater Than 262 Tons Per Day	Facilities With Intakes Greater Than 524 Tons Per Day
(1) Average Tip Fee With Flow Control	$40.34	$35.37	$39.09
(2) Average Tip Fee Without Flow Control	$30.38	$31.11	$32.98
(3) Flow Control Cost	$9.96	$4.26	$6.11
(4) Percent Increase in the Average Tip Fee With Flow Control Due to Flow Control [Row (3) ÷ Row (2)]	32.78%	13.70%	18.52%

Notes and Sources

These values are based on a regression analysis of tip fees using data from Chartwell Information Publishers. Browning-Ferris Industries identified which facilities are subject to flow control. Population density data is from the U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States: 1993*, (113th edition.) Washington, DC, 1993, Table No. 31. The values presented are mean values determined by the following equation: tip fee= f(mean state population density, existence of flow controls). The mean population density for all facilities is 145.382 persons per square mile. For facilities whose intake is greater than 262 tons per day, it is 159.454 persons per square mile. For facilities whose intake is greater than 524 tons per day, it is 181.002 persons per square mile.

Observations are further restricted to facilities which have tip fees greater than 0 and remaining capacity greater than 1 year.

AVERAGE LANDFILL TIP FEE

With and Without Flow Control

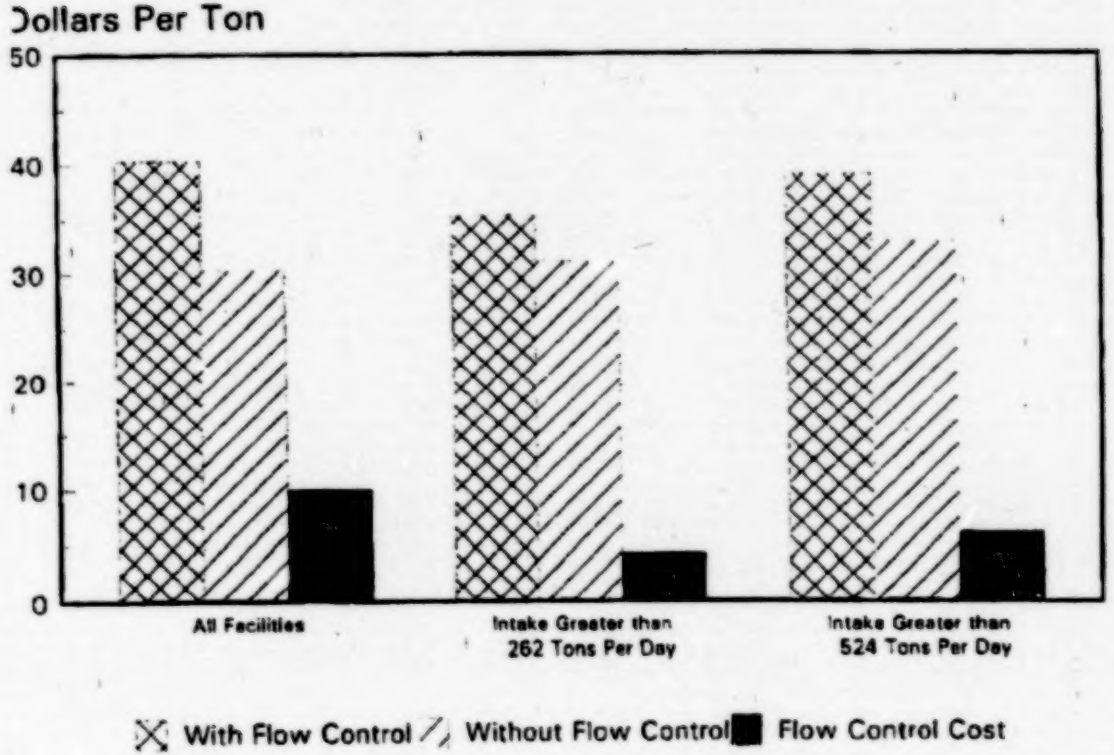


FIGURE 3

TABLE 3

AVERAGE INCINERATOR TIP FEE

With and Without Flow Control

($/ton)

	All Facilities	Facilities With Intakes Greater Than 262 Tons Per Day	Facilities With Intakes Greater Than 524 Tons Per Day
(1) Average Tip Fee With Flow Control	$60.63	$62.30	$61.46
(2) Average Tip Fee Without Flow Control	$49.16	$45.92	$48.99
(3) Flow Control Cost	$11.46	$16.38	$12.47
(4) Percent Increase in the Average Tip Fee With Flow Control Due to Flow Control [Row (3) ÷ Row (2)]	23.32%	35.66%	25.45%

Notes and Sources:

These values are based on a regression analysis of tip fees using data from Chartwell Information Publishers. Browning-Ferris Industries identified which facilities are subject to flow control. Population density data is from the U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States: 1993*, (113th edition.) Washington, DC, 1993, Table No. 31. The values presented are mean values determined by the following equation: tip fee= f(mean state population density, existence of flow controls). The mean population density for all facilities is 237.335 persons per square mile. For facilities whose intake is greater than 262 tons per day, it is 312.284 persons per square mile. For facilities whose intake is greater than 524 tons per day, it is 342.692 persons per square mile.

Observations are further restricted to facilities which have tip fees greater than 0 and remaining capacity greater than 1 year.

AVERAGE INCINERATOR TIP FEE

With and Without Flow Control

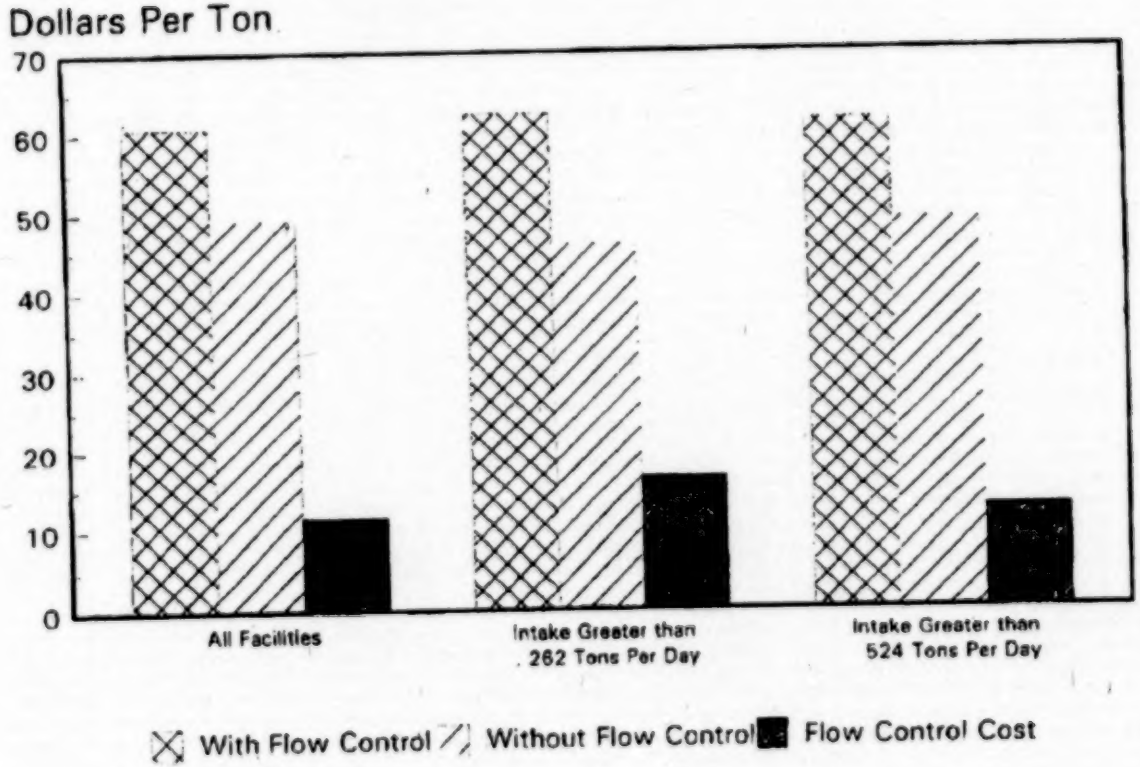


FIGURE 4

TABLE 4

AVERAGE TRANSFER STATION TIP FEE

With and Without Flow Control
($/ton)

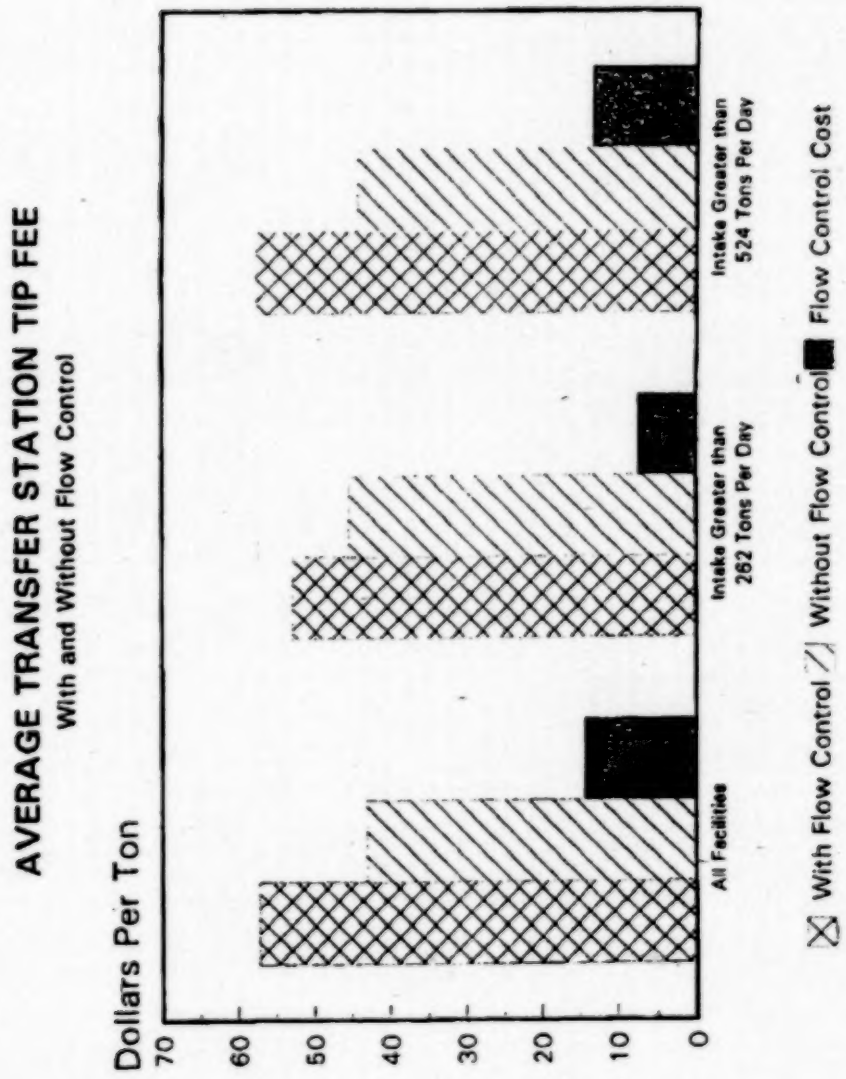
	All Facilities	Facilities With Intakes Greater Than 262 Tons Per Day	Facilities With Intakes Greater Than 524 Tons Per Day
(1) Average Tip Fee With Flow Control	$57.20	$52.89	$57.67
(2) Average Tip Fee Without Flow Control	$43.08	$45.47	$44.41
(3) Flow Control Cost	$14.12	$7.43	$13.25
(4) Percent Increase in the Average Tip Fee With Flow Control Due to Flow Control [Row (3) ÷ Row (2)]	32.78%	16.34%	29.84%

Notes and Sources

These values are based on a regression analysis of tip fees using data from Chartwell Information Publishers. Browning-Ferris Industries identified which facilities are subject to flow control. Population density data is from the U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States: 1993*, (113th edition.) Washington, DC, 1993, Table No. 31. The values presented are mean values determined by the following equation: tip fee= f(mean state population density, existence of flow controls). The mean population density for all facilities is 259.825 persons per square mile. For facilities whose intake is greater than 262 tons per day, it is 251.678 persons per square mile. For facilities whose intake is greater than 524 tons per day, it is 270.267 persons per square mile.

Observations are further restricted to facilities which have tip fees greater than 0 and remaining capacity greater than 1 year.

FIGURE 5


AVERAGE TRANSFER STATION TIP FEE
With and Without Flow Control
Dollars Per Ton
70
60
50
40
30
20
10
0
All Facilities
Intake Greater than 262 Tons Per Day
Intake Greater than 524 Tons Per Day
With Flow Control
Without Flow Control
Flow Control Cost

V. CASE STUDIES

In addition to the econometric analysis, we studied disposal/processing alternatives at three locations—Medina County, Ohio; Des Moines, Iowa; and Onondaga County, New York—comparing the tipping fee at flow control facilities to other nearby facilities, accounting for transportation costs. We also reviewed case studies conducted by other organizations. The additional case studies and our review confirm the results of our econometric analysis.

Two of the three case studies we conducted—in Medina and Onondaga Counties—showed that if local waste generators were free to shop for disposal sites, they could reduce tipping fees by about $20 on average. In Des Moines, however, the tipping fee at the flow control facility was quite modest and in fact lower than the nearby alternatives. This is consistent with statistical results. Not all flow control facilities are more expensive. The results of these case study comparisons are presented in Tables 5, 6, and 7.

We reviewed flow control case studies conducted by other organizations including flows and data presented in various legal cases including C&A Carbone. These studies present flow control costs which equal or exceed those determined in this econometric analysis.

TABLE 5

FLOW CONTROL IN MEDINA COUNTY, OHIO PREVENTS WASTE GENERATORS FROM SAVING APPROXIMATELY $20 PER TON

Name of Disposal Facility	Type	Tip Fee ($/ton)	Cost per Ton/Mile ($)	Distance to Facility (miles)	Total Cost ($/ton) (3)+[(4)x(5)]
(1)	(2)	(3)	(4)	(5)	(6)
(1) Medina County MRF	TS	58.00	0.057	0	58.00
(2) American Landfill	LF	25.00	0.05	45	27.56
(3) Mahoning Landfill	LF	25.00	0.057	60	28.41
(4) City of East Liverpool Landfill	LF	26.01	0.057	70	29.99
(5) R.C. Miller Transfer Station	TS	28.71	0.057	35	30.70
(6) BFI/Carbon Limestone Sanitary Landfill	LF	30.00	0.057	50	32.84
(7) BFI/Lorain County Landfill	LF	34.47	0.057	20	35.61
(8) Laidlaw/Cherokee Run-Bellefontaine Landfill	LF	30.00	0.057	110	36.25
(9) Athens-Hocking (Kilbarger) Landfill	LF	30.00	0.057	120	36.82
(10) Laidlaw/Williams County Landfill	LF	31.00	0.057	140	38.95
(11) WMI/Evergreen Recycling & Disposal Landfill	LF	35.55	0.057	90	40.66
(12) Royalton Road Sanitary Landfill	LF	43.50	0.057	15	44.35
(13) Northern Ohio Waste Transfer Station	TS	46.60	0.057	15	47.45
(14) Doherty Landfill	LF	47.50	0.057	70	51.48
(15) Average of Alternate Disposal Facilities					37.01
(16) Difference [(Row (1) - Row (15)]					20.99

Sources and Notes

Row (1): Based on Browning-Ferris Industries memo regarding flow control in Medina, Ohio, dated April 19, 1995.

Rows (2) through (14): Based on data from Chartwell Information Publishers and Browning-Ferris Industries.

Column (4): Cost per mile based on Kinheim and Ketcham's rate of $1.25 for a tractor/trailer rig. It is assumed that each rig holds 22 tons. The cost per mile is $1.25/22 tons, or $0.057. *Exporting Waste: A Report on Locations, Quantities and Costs of Out-of-City/State Disposal of New York City Commercial Waste.* Kinheim & Ketcham, April 1991.

Column (5): Distance to facility based on American Map Corporation, *Pinstripe Business Control Atlas 1992.* This list includes facilities within 150 miles of Medina, OH. It does not include the following facilities since their locations were unknown: Coshocton Landfill, Inc. and WMI/Suburban South Landfill.

All facilities except the Medina County MRF are privately-owned. All facilities are subject to flow control, however, the alternate facilities listed indicated that they accepted out-of-county waste. Facilities are restricted to those whose intake is greater than 262 tons per day.

TABLE 6

FLOW CONTROL IN ONONDAGA COUNTY, NEW YORK PREVENTS WASTE GENERATORS FROM SAVING APPROXIMATELY $20 PER TON

Name of Disposal Facility	Type	Tip Fee ($/ton)	Cost per Ton/Mile ($)	Distance to Facility (miles)	Total Cost ($/ton) (3)+[(4)x(5)]
(1)	(2)	(3)	(4)	(5)	(6)
(1) Onondaga County Resource Recovery Facility	IN	93.50	0.057	0	93.50
(2) Charles Point R&R Facility Incinerator	IN	53.75	0.057	185	64.26
(3) Modern Landfill	LF	56.26	0.057	150	66.78
(4) Energy From Waste/American Ref-fuel Niagra Facility	IN	60.00	0.057	150	68.52
(5) WMI/High Acres Sanitary Landfill	LF	65.00	0.057	70	68.98
(6) American Ref-fuel WTE Incinerator	IN	69.00	0.057	210	80.93
(7) Adirondack Resource Recovery Facility Incinerator	IN	85.00	0.057	135	92.67
(8) Average of Alternate Disposal Facilities					73.69
(9) Difference [Row (3) - Row (8)]					19.81

Sources and Notes

Row (1): Based on Browning-Ferris Industries memo regarding "Flow Control in Syracuse" dated April 19, 1995.

Rows (2) through (7): Based on data from Chartwell Information Publishers and Browning-Ferris Industries.

Column (4): Cost per mile based on Kosheim and Ketcham's rate of $1.25 for a tractor/trailer rig. It is assumed that each rig holds 22 tons. The cost per mile is $1.25/22 tons, or $0.057. *Exporting Waste. A Report on Locations, Quantities and Costs of Out-of-City/State Disposal of New York City Commercial Waste*, Kosheim & Ketcham, April 1991.

Column (5): Distance to facility based on American Map Corporation, *Pinpoint Business Control Atlas 1992*.

Alternate facilities are limited to those whose intake is greater than 262 tons per day.

All facilities except Onondaga County Resource Recovery Facility are privately-owned. All facilities except Modern Landfill are subject to flow control. The list does not include CID Sanitary Landfill since its location is unknown.

TABLE 7

FLOW CONTROL IN DES MOINES, IOWA DOES NOT INCREASE DISPOSAL COSTS

	Name of Disposal Facility	Type	Tip Fee ($/ton)	Cost per Ton/Mile ($)	Distance to Facility (miles)	Total Cost ($/ton) (3)+[(4)x(5)]
	(1)	(2)	(3)	(4)	(5)	(6)
(1)	Metro Park East Landfill	LF	25.00	0.057	0	25.00
(2)	Metro Transfer Station	TS	25.00	0.057	0	25.00
(3)	Delaware County Sanitary Landfill	LF	7.50	0.057	135	15.17
(4)	North Dallas Sanitary Landfill	LF	14.00	0.057	30	15.70
(5)	Cerro Gerdo County/Landfill North Iowa	LF	16.00	0.057	110	22.25
(6)	Dickinson County Sanitary Landfill	LF	15.00	0.057	150	26.52
(7)	Tri-County Disposal Transfer Station	TS	15.00	0.057	160	27.09
(8)	Ames-Story Environmental Corp. Landfill	LF	28.71	0.057	30	30.41
(9)	Palo Alto County Sanitary Landfill	LF	28.00	0.057	120	34.82
(10)	Winnebago County Sanitary Landfill	LF	30.00	0.057	130	37.39
(11)	Cass County Sanitary Landfill	LF	50.00	0.057	70	53.98
(12)	Average of Alternate Disposal Facilities					29.26
(13)	Difference [(Rows (1)+(2)/2) - Row (12)]					(4.26)

Sources and Notes

Rows (1) and (2): Based on data from Browning-Ferris Industries memo regarding "Flow Control Study Information" dated April 19, 1995.

Rows (3) through (11): Based on data from Chartwell Information Publishers and Browning-Ferris Industries.

Column (4): Cost per mile based on Konheim and Ketcham's rate of $1.25 for a tractor/trailer rig. It is assumed that each rig holds 22 tons. The cost per mile is $1.25/22 tons, or $0.057. *Exporting Waste: A Report on Locations, Quantities and Costs of Out-of-City/State Disposal of New York City Commercial Waste*, Konheim & Ketcham, April 1991.

Column (5): Distance to facility based on American Map Corporation, *Pinstripe Business Control Atlas 1992*.

All facilities except the Metro Park East Landfill and the Metro Transfer Station are privately-owned and are not subject to flow control.

[ATTACHMENTS A & B OMITTED IN PRINTING]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

REBUTTAL REPORT OF MARK P. BERKMAN

I. Introduction

1. I previously filed an expert report in this matter.[1]

2. I have been asked to review and comment on the Expert Report of Robert N. Stavins filed in this matter on January 10, 2003.

II. Summary of Opinion

3. Based on my review of Dr. Stavins report, I believe that he has failed to support his conclusions that: 1) the local laws do not burden interstate commerce as currently implemented and will not impose such a burden when implemented as intended; 2) the objectives sought by the Counties waste management plan produce legitimate public benefits; and 3) flow control's "unique characteristics" provide greater public benefits than alternatives that have a lesser impact on interstate commerce. As I stated in my previous report, I have concluded that 1) the local laws have and will interfere with interstate commerce; 2) the primary benefits of these laws are chiefly financial; and 3) there are alternatives to obtain the non-financial benefits that do not impose an interstate burden. I address each of these conclusions in the context of Dr. Stavins' arguments below.

---

[1] Expert Report of Mark P. Berkman, November 15, 2002.

III. Dr. Stavins Fails to Demonstrate that the Local Laws Have Not Burdened and Will Not Burden Interstate Commerce

4. Dr. Stavins asserts that the local laws as currently implemented may have actually increased interstate trade rather than restricting it. He comes to this assertion by claiming: first, that the Oneida Herkimer Waste Authority directed all waste to an out-of-state facility for a period; second, that the Authority's transfer stations promoted larger shipments earlier than would have been the case in an unfettered market, and third that absent the local laws, it is unlikely that waste would have been shipped out-of-state. He fails, however, to adequately support these claims.

5. The shipment of waste to an out-of-state landfill was the consequence of the Authority's failure to complete its comprehensive plan. It has been unable to construct a landfill within county borders. To take credit for promoting interstate trade when the plan calls for a complete restriction is disingenuous. As I pointed out in my previous report, if all counties had successfully followed plans similar to those of the Authority – which, by way of remainder, is precluded by State law from managing solid waste generated outside of Oneida and Herkimer Counties – there would have been no where to send Oneida and Herkimer County waste.

6. Dr. Stavins observation that the timing and size of the Authority's transfer stations promoted earlier and greater exports is incorrect. There is ample evidence that private transfer stations were becoming widespread when the Authority constructed its facilities. As of 1991 when the Authority first began operating a transfer station, approximately 41 percent

of such stations in New York State were private.[2] In addition, the size of the facilities does not necessarily promote longer distance hauls as Dr. Stavins suggests. While it is true that larger facilities may provide the means to spread capital costs across a larger number of tons (economies of scale) this advantage can easily be offset by location advantages offered by smaller facilities.[3] Smaller facilities may reduce collection and disposal route distances.[4]

7. Dr. Stavins admits that it is difficult to predict what share of waste would have been exported absent the local laws, but he allows that the share would have been small because so little waste has been exported from New York State when New York City is excluded. This is hardly the controlled experiment necessary to measure the impact of the local laws. In the absence of these laws and similar flow control ordinances in other New York counties, substantially more waste could easily have been exported. Landfill development in the state could have looked very different as well. Fewer facilities may have developed in the face of low cost competition from already licensed out-of-state facilities. Dr Stavins rejects my observations regarding the plans and actions of the plaintiffs in this case to export waste, describing them as qualitative not quantitative. The fact that these private firms were actively exporting waste and making investment plans to export more and that others could easily have followed suit in the absence of the local laws cannot be so easily

---

[2] Based on transfer station data provided by Chartwell private transfer stations accounted for 39 percent based on waste volume handled.

[3] It is also important to note that the economies of scale in transfer stations are likely to be modest. These facilities are typically not capital intensive. Therefore, upfront costs are generally low.

[4] U.S. EPA, Waste Transfer Stations: A Manual for Decision Making

dismissed. Moreover, if the probability of out-of-state shipments was so low, there would have been no need to impose flow control in the first place.

8. Dr Stavins ignores the evidence that, especially with the introduction of large scale regional landfills and transfers stations, the reach of economic solid waste markets has expanded. As Robert Porter has observed, "On a planet honeycombed with nations, states, and counties, economic forces urge ever more intercounty, interstate, and international trade in waste."[5] Out-of-state disposal sites are clearly able to compete for waste generated in Oneida and Herkimer Counties and have done so. They would undoubtedly have been substantial players in the absence of the local laws.

IV. Dr. Stavins Fails To Demonstrate That The Local Laws Support Clear Non-Financial Benefits

9. Dr. Stavins ignores the fact that the local laws were clearly imposed, in part, to provide the means for the Counties to recover their losses associated with the failed Oneida Energy Recovery Facility (ERF), the associated ash landfill, and landfill planning and development. This accounts for more than 11 percent of the Authority's indebtedness.[6] This represents a purely financial benefit.

10. Dr Stavins asserts that the local laws' objectives represent legitimate public benefits. He focuses principally on the laws' objective to support recycling, which he notes is also favored by federal and state policy. Dr. Stavins argues that the presence of what economists refer to as externalities provides a

---

[5] Robert Porter, The Economics of Waste, Washington D.C.: RFF Press, (2002) p. 103.

[6] See, M. Berkman, Expert Report, November, 15, 2002, Exhibit 4.

clear economic justification for government involvement to meet this objective.[7] He assumes, without support, that externalities are sufficiently great to support the Authority's recycling objectives and costs. I have seen no studies by Dr. Stavins or the Counties that support this assumption. The available evidence, in fact, suggests that the Authorities recycling costs exceed their benefits. Note that disposal costs at the Authority's facilities is currently $ 86 per ton. This exceeds the average landfill tipping fee in New York State by $34.30 per ton ($86-51.70).[8] This indicates that unless the externalities in disposal not already internalized approach this figure, that the Authority's program results in net costs to the Counties not benefits. Most, if not all externalities related to landfill waste disposal have been internalized. Landfills now operate under strict regulations and do not present substantial, if any, externalities.[9] Thus, unless program costs net of revenues plus this differential equal the benefits of recycling then the Counties are creating net costs not benefits. This is quite possibly the case.

---

[7] Dr. Stavins provides the following technical definition of an externality: "whenever either the cost or benefit to society as a whole that results from a particular activity is different from the costs or benefits experienced by the individuals making decisions about the activity," Stavins Expert Report, p. 19. For a more specific example note that landfills and materials recovery facilities may create noise or traffic congestion. These are costs to society that are not reflected in the operating costs of the facilities. Unless regulations are imposed to curb these costs or taxes are imposed to reflect them, they remain external to the facility owners investment and operating decisions.

[8] Based on tipping fees reported in Solid Waste Digest, Northeast Region, August 2002.

[9] The U.S. EPA concluded that subtitle D landfills do not create externalities. See, U.S. EPA, Regulatory Impact Analysis for the Final Criteria for Municipal Solid Waste Landfills (EPA530-SW-91-073a and 073b), 1991.

11. This, however, is really not the venue to conduct a cost-benefit study of the Authority's program. The key issue under the Pike Test, assuming that County residents consider recycling a reasonable objective, is whether the objective could be met without burdening interstate commerce. I address this question below.

V. Dr. Stavins Fails To Demonstrate That The Restrictions Imposed By The Local Laws To Meet The Counties Objectives Could Not Be Met By Other Means Less Burdensome To Interstate Commerce.

12. Dr. Stavins concludes that, "I cannot conceive of any feasible alternatives [to flow control] that would offer the same level of public benefits".[10] He appears, however, to base this conclusion on only a cursory review of alternatives.

13. Even a brief review of recycling programs — the primary benefit of the Authority's plan according to Dr. Stavins — indicates that many local jurisdictions have achieved their recycling goals without flow control. Many have adopted unit pricing to achieve this.[11] For example, an EPA case study of jurisdictions relying on unit pricing to promote recycling and waste reduction did not find flow control a necessary condition for success.[12] In addition, EPA's "Decision Maker's Guide to Solid

---

[10] Expert Report of Robert N. Stavins, January 10, 2003, p. 36.

[11] An EPA sponsored review of the literature on unit pricing found that it promoted recycling. See, Marie Lynn Miranda, et. al. "Unit Pricing Programs for Residential Municipal Solid Waste: An Assessment of the Literature," prepared for the Office of Policy, Planning and Evaluation, U.S. Environmental Protection Agency, March 1996.

[12] Scott Bauer and Marie Lynn Miranda, "The Urban Performance of Unit Pricing: An Analysis of Variable Rates for Residential Garbage Collection in Urban Areas," Nicholas School of the Environment, Duke University, April 1996.

Waste Management" make no mention of flow control in the chapter on recycling.[13]

14. For example, Portland, Oregon, which has a nationally recognized recycling program with a rate of 57%, relies on unit pricing without any restrictions on flow.[14] More than 50 private haulers serve Portland residents and select their own disposal destinations.[15]

15. Over 4,000 jurisdictions nationwide were found to employ unit pricing according to a recent survey.[16] Several communities in Oneida and Herkimer Counties have employed bag systems, a form of unit pricing, to manage waste and promote recycling. The Authority acknowledged these programs, but rejected this approach following only what appears to be a limited analysis.[17] The Authority did impose a uniform surcharge on non-recyclable waste at the origin, but did not explicitly indicate that flow control was a necessary complement.[18]

16. Dr. Stavins has not provided any reason why such a surcharge could not have been imposed absent flow control. Note that even if unit pricing required additional administrative costs without flow control, it would be this cost that should be balanced against the burdens on interstate commerce.

---

[13] U.S. EPA, "Decision Maker's Guide to Solid Waste Management," Vol II, Chapter 6, Recycling.

[14] City of Portland, Office of Sustainable Development.

[15] Bauer and Miranda, p. 31.

[16] U.S. EPA, "Unit-Based Pricing in the United States: A Tally of Communities (http://www.epa.govicgibin/epaprintonly.cgi.

[17] See Defendants response to Interrogatory 4 and memorandum to Hans Arnold et al. from Pat Donovan, November 5, 1990.

[18] See memoranda to Hans Arnold from Patrick Donovan, May 3, 1991, May 5, 1991, and September 11th, 1991.

Executed this 29th of January, 2003, at Oakland, California.

/S/Mark P. Berkman
Mark P. Berkman

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

PLAINTIFFS' SUPPLEMENTAL RESPONSE TO DEFENDANTS' THIRD SET OF INTERROGATORIES

Pursuant to the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the Northern District of New York, plaintiffs United Haulers Association, Inc., Transfer Systems Inc., Bliss Enterprises Inc., Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial Containers, Inc., and Ingersoll Pickup, Inc. ("Plaintiffs"), by and through their attorney Kevin C. Murphy, Esquire, hereby supplement their responses to the Defendants' Third Set of Interrogatories as follows:

General Objections To Interrogatories

Plaintiffs refer to and incorporate by reference their general and specific objections to Defendants' Third Set of Interrogatories as set forth in Plaintiffs' responses dated July 9, 2002 as if fully set forth herein. Without waiving these objections, Plaintiffs supplement their responses as follows.

Interrogatories

1. Identify with specificity the Out-of-State Interest, if any, which the Plaintiffs intend to prove is adversely and disproportionately impacted, with respect to similarly situated In-State Interests, by the operation of the Flow Control Legislation and describe the injury suffered by such Interest.

Answer: The Oneida-Herkimer Flow Control Legislation interferes with the free and unfettered

movement of solid waste across intrastate and interstate boundaries by directing that all solid waste and designated recyclables be delivered to Authority facilities, thus precluding their delivery for processing, transport, disposal or recycling to facilities outside of the Authority's geographical boundary. Plaintiffs further contend that, given the above circumstance, the Flow Control Legislation facially discriminates against interstate commerce in that it excludes both in-state and out-of-state competition for waste and waste services and otherwise serves to isolate Oneida County and Herkimer County from the interstate waste market. Plaintiffs do not contend, based on its review of discovery material to date, that Out-of-State Interests are disproportionately impacted.

2. Identify the In-State Interest, if any, which the Plaintiffs intend to prove is disproportionately benefitted or favored, with respect to similarly situated Out-of-State Interests which exceed the burdens placed on In-State interests, which Plaintiffs intended to prove are the result of the operation of the Flow Control Legislation.

Answer: Plaintiffs will establish that the economic interests of Defendants are disproportionately benefitted and/or favored by the Flow Control Laws to the extent that the Flow Control Laws allow Defendants to set tipping fees at a rate designed to (1) obviate the need for any funding by Oneida or Herkimer County and (2) finance modified, additional and/or expanded facilities and programs at the ultimate expense of interstate commerce, including but not limited to, out-of-state waste generators and waste disposal services by impeding the availability of disposal services and options. Plaintiffs will further establish that Flow Control Laws disproportionately benefit and/or favor local economic interests by providing a financing mechanism for Defendants' proposed landfill which, in turn, will provide

Defendants with a mechanism to secure millions of dollars spent annually in out-of-region disposal and ensure that the same will remain in the local economy, again at the ultimate expense of interstate commerce, including but not limited to, out-of-state waste generators and waste disposal services by impeding the availability of disposal services and options and thereby driving up the cost of disposal for in-state and out-of-state waste generators and waste disposal services.

3. To the extent not contained in the response to Interrogatory No.1, above, describe with particularity any burdens placed on Out-of-State Interests which exceed the burdens placed on In-State Interests, which Plaintiffs intend to prove are the result of the operation of the Flow Control Legislation.

Answer: Based on the available record and documents reviewed to date and subject to expert review and analysis, Plaintiffs do not contend that the burden on Out-of-State Interests exceed the burdens on In-State Interests.

4. Identify any other disparate impact on interstate commerce which Plaintiffs intend to prove is caused by the operation of the Flow Control Legislation.

Answer: The Flow Control Legislation, by pre-determining and fixing tipping fees, effectively eliminates competition and innovation in the market and precludes access to competitive and innovative markets and thus restricts the flow of waste in inter-state commerce.

5. Identify any law, rule, regulation, or regulatory scheme of any State which the Plaintiffs intend to prove is in conflict with, or suffers interference from, the operation of the Flow Control Legislation and describe the nature of the conflict or interference.

Answer: The Flow Control Legislation is in conflict with Article I, Section 8, clause 3 of the United States Constitution such that it interferes with the free and unrestricted-flow of solid waste in interstate commerce. The Flow Control Legislation interferes with Title 13- FF of the Public Authorities Law in that the hoarding of recyclables interferes with the Legislature's finding "that it is the public policy of the state to encourage and support the role of the private sector in recycling and nothing in this act shall be interpreted as authorizing unfair competition between municipalities and scrap dealers, processors and consumers." Legislative Findings, L. 1988, c. 627, § 1. As set forth in response to interrogatory no. 2 above, the hoarding of solid waste restricts the availability solid waste and, therefore, revenue streams to non-designated facilities which, over time, will likely lead to the closure and elimination of non-designated facilities.

6. Identify any Persons whom Plaintiffs intend to call as witnesses to testify in support of the responses to each Interrogatory set forth above, and identify the factual issue to be addressed by each such witness.

Answer: Plaintiffs will potentially call a representative of each individually named plaintiff to testify regarding the nature of their business pre- and post-flow control and the impact of flow control on their respective businesses.

Plaintiffs anticipate providing an expert report(s) that generally addresses the impact of flow control on interstate commerce as well as potential alternatives to the subject Flow Control Laws.

Plaintiffs anticipate calling one or more representatives of the defendants to testify regarding the Flow Control Laws and the operations of the Authority.

Plaintiffs have not yet identified those witnesses or topics of inquiry with any further specificity.

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS INC., BLISS ENTERPRISES INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., and INGERSOLL PICKUP, INC.

Dated: September 12, 2002
Syracuse, New York

/S/ Kevin C. Murphy

Kevin C. Murphy, Esq.
Lisa DiPoala Haber, Esq.
Devorsetz Stinziana Gilberti
Heintz & Smith, P.C.
Attorneys for all Plaintiffs
555 East Genesee Street
Syracuse, New York 13202
(315) 442-0100

Kevin M. Young, Esq.
Young, Sommer Law Firm
Executive Woods
5 Palisades Drive
Albany, NY 12205

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

EXPERT REPORT OF ROBERT N. STAVINS

I. INTRODUCTION

1. My name is Robert N. Stavins. I am the Albert Pratt Professor of Business and Government and Chairman of the Environment and Natural Resources Faculty Group at the John F. Kennedy School of Government, Harvard University, where I am also the Director of the university-wide Environmental Economics Program. In addition, I am the former Chairman of the U.S. Environmental Protection Agency's (EPA) Environmental Economics Advisory Committee, of which I have been a Member since it was founded in 1992. My scholarly research and my public policy engagement with Federal, state, and local governments have focused on the use of policy instruments to achieve environmental objectives, as well as the analysis of the benefits and costs of environmental and related public policies. During the course of my research, I have examined a wide array of policy areas, including solid waste management. I have written numerous articles that have appeared in leading economics journals and have authored or edited four books, including *Public Policies for Environmental Protection*. A more detailed description of my background and credentials, including a list of my publications, is available in the attached copy of my curriculum vitae (Appendix A).

2. I have been asked by Counsel for the defendants to provide an economic interpretation of the application of the *Pike* balancing test to Oneida County Local Law #1 of 1990 and Herkimer County Local Law #1 of 1990 (hereafter the "Local Laws"), which control the flow of local solid waste ("flow control"). I understand that the *Pike* balancing test, enunciated in *Pike v. Bruce Church Inc.*, 397 U.S. 137, 90 S.Ct. 844 (1970), is intended to assess the validity of statutes that regulate to achieve a legitimate local public interest in an even-handed manner, with only incidental effects on interstate commerce. In that Supreme Court decision, Justice Stewart wrote that a statute "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

3. In particular, I have been asked to inform the application of the *Pike* test to the laws of Oneida County and Herkimer County (hereafter "the Counties") by:

- Assessing whether these laws place a burden on interstate commerce.
- Examining the benefits of the laws and assessing whether there is evidence suggesting that any burden that these laws may place on interstate commerce is *clearly excessive* relative to those benefits.
- And, determining the extent to which feasible alternatives can achieve the same benefits as the existing laws while placing a lesser burden on interstate commerce.

In addition, I have been asked to review, assess, and comment on the report filed by the plaintiffs' expert, Dr. Mark Berkman.

4. As part of my work in this case, I have studied various documents that pertain to these issues. A list of the documents I have reviewed can be found in Appendix B.

5. I am being compensated for my work in this case at the rate of $500 per hour. My compensation is neither contingent on my findings nor on the outcome of this litigation. Part of the work for this investigation was performed by others under my direction. I have not testified at trial or in deposition on any matter during the previous four years.

6. In Section II of this report, I examine the history of the Local Laws, and what they require of those dealing with solid waste in the Counties. In Section III, I provide an assessment of those economic effects that may be relevant in evaluating burdens on interstate commerce posed by the Local Laws. In Section IV, I provide an economic perspective on the benefits sought by the Local Laws and the extent to which the Counties are succeeding in achieving those benefits. In Section V, I examine whether alternatives to flow control exist that could bring about the same level of public benefits. Finally, I present my conclusions in Section VI. But, first, I offer a brief summary of those conclusions.

Preview of conclusions

7. As a result of my work in this case, I have reached the following general conclusions, which are developed and discussed in detail in subsequent sections of this report:

- The Local Laws, as currently implemented, *do not place a qualitatively or quantitatively greater burden on out-of-state interests*, relative to similarly situated in-state interests. Indeed, there is reason to believe the defendants' waste management plan and associated

flow control may have *increased* interstate commerce relative to what would have occurred in their absence.

- If the Oneida-Herkimer Solid Waste Management Authority (hereafter "the Authority") does construct a public landfill, this will have the effect of reducing private commerce in general. There is nothing in the nature of such a reduction in private commerce that would disproportionately burden interstate commerce relative to in-state commerce. Moreover, substantial evidence suggests that the burden of such a reduction in private commerce would *fall most heavily on in-state disposal sites if the landfill were to be constructed today.*

- With or without such a public landfill, *there is no evidence to suggest that the Local Laws place any extraterritorial burden on interstate commerce.* That is, they do not increase the cost of waste disposal in the interstate marketplace for those outside the Counties.

- My economic assessment indicates that the objectives sought by the Counties' waste management plan produce *legitimate public benefits.* Moreover, the evidence indicates that the Counties have been successful in achieving these objectives.

- Unique characteristics of flow control significantly *enhance* the achievement of some of the public benefits. They also ensure the achievement of other benefits that would be *unachievable* in the absence of such flow control. Therefore, *feasible alternatives to flow control that have a lesser impact on interstate commerce could not yield the same level of public benefits.*

II. HISTORY AND DESCRIPTION OF THE COUNTIES' LOCAL LAWS

8. The flow control provisions at issue in this case were included in Oneida County Local Law #1 of 1990 and Herkimer County Local Law #1 of 1990, legislation that was adopted to support a comprehensive waste management plan developed by the Counties in the late 1980s. This plan arose during a period of heightened local, state, and national concern regarding solid waste management. The period was punctuated locally by, among other developments: increased public awareness of the existing solid waste infrastructure's environmental hazards; the naming of local businesses, municipalities, and school districts as third-party defendants in a federal clean-up action at a privately-owned, local landfill; and significant expressions of willingness on the part of residents to reduce their contributions to waste disposal levels by recycling.[1]

9. The realization of the Counties' waste management plan was made possible by the creation of the Authority in 1988, which implements the Counties' plan, and by the subsequent development of public, waste management infrastructure. This included the construction of two primary transfer stations, one satellite transfer station, convenience stations, a recycling center, a compost facility, and a household hazardous waste collection facility. In addition to managing the treatment of waste in accordance with the Counties' plan — including disposing of, composting, and recycling components of the waste stream — the Authority provides a number of additional public services, such as waste audits and educational programs. These programs are integrated to complement each other in a single system. All Authority activities are financed by a system charge levied on non-

---

[1] *See* 'Solid Waste Practices and Citizen Attitudes Regarding Recycling in Oneida-Herkimer Counties,' William F. Cosulich Associates, P.C. & John Zobgy Associates Inc, New York, April 1988.

recyclable waste together with revenues derived from the sale of recyclable materials. Authority "tipping fees" for disposal of non-recyclable waste are set so as to assure that revenues are sufficient to cover the Authority's overall costs, and are generally higher than tipping fees charged by disposal facilities which do not provide or support similar recycling or other services.

10. The Local Laws, among other provisions, require that waste generators separate recyclable from non-recyclable waste.[2] While generators may arrange to have their recyclable material sent directly to a buyer outside the Authority's system, if they do not make such arrangements, they must place recyclables at curbside for delivery to the Authority. No fee is charged for delivery of recyclables. The Local Laws provide that private haulers must deliver all acceptable, non-recyclable solid waste and curbside collected recyclables generated within the Counties to an Authority-designated facility. Recyclable material left by generators at curbside is delivered to the Authority's recycling center, which processes and markets the material. Non-recyclable waste is brought to the Authority's transfer stations. This waste is inspected to ensure that it does not contain dangerous or hazardous materials and that trash collectors, and the generators they collect from, are complying with recycling requirements. Following this inspection, the waste is processed to facilitate transportation to its ultimate disposal site by a contractor chosen by the Authority through a periodic, open, and competitive bidding process.

11. Twice since implementing flow control, the Authority has selected contractors — and associated disposal sites for

---

[2] This is consistent with New York State's commitment to source separation, codified in General Municipal Law 120-aa. *See* 'Are We Throwing it all Away? A Call for New York to Recommit to Recycling,' Office of New York Attorney General Eliot Spitzer, May 1, 2000, <http://www.oag.state.ny.us/press/reports/recycling/recycling.html>, visited January 5, 2002.

the Counties' non-recyclable waste — based on bids submitted in response to requests for proposals (RFPs). Firms offering disposal services were evaluated according to environmental, technical, financial, business, and cost criteria. As stated in the 1997 RFP, "The Agreement will be awarded to the most responsive and responsible Respondent demonstrating the requisite experience and skill in the necessary technologies, and proposing a plan that provides the most cost-effective method of disposing of solid waste with maximum protection of human health and the environment."[3]

12. The Authority's facilities and programs have replaced undifferentiated disposal of local waste with facilities and programs designed to manage and recycle specific components of the waste stream. Since 1989, the Authority has reliably and safely disposed of over 2.3 million tons of solid waste generated in the Counties.[4] Since the opening of the Materials Recovery Facility in 1991, the Authority has processed and sold over 370,000 tons of recyclable materials, yielding more than $13 million in revenues. These 370,000 tons are equivalent to the amount of landfill capacity used by the Counties over the course of one-and-a-half years. The cost of landfilling these recyclable materials, at $55 per ton, would have been over $20 million. Since the opening of the Green Waste Facility in 1992, the Authority has received and composted over 140,000 tons of yard debris, and made over 50,000 cubic yards of compost and mulch available to the residents of the counties. The avoided cost of landfilling these materials, at $55 per ton, is more than $7.5 million. Similarly, since its opening in 1993 the Household

---

[3] *See* 'Request for Proposals, Solid Waste Processing, Transporting, and Disposal Service,' Oneida-Herkimer Solid Waste Management Authority, December 17, 1997.

[4] *See* Response to Plantiffs' Interrogatories, United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Authority, CV-95-0516, United States District Court Northern District of New York, August 30, 2002.

Hazardous Waste facility has received and reliably disposed of, or recycled, over 260,000 gallons of liquid hazardous waste.

13. While a private contractor is currently disposing of the Counties' non-recyclable waste, the Authority is engaged in the process of permitting a public landfill. In the event that that landfill is permitted and built, the Counties' non-recyclable waste will be directed to it. However, I have been informed that it is by no means certain that the proposed landfill will, in fact, be built.[5] If and when all the necessary permits are secured, the Authority's Board will need to decide whether to proceed with construction. It is my understanding that the decision will involve an assessment of the relative merits of building the landfill, compared to continuing to rely on the private marketplace for disposal. Consequently, in this report, I evaluate the Local Laws both as they are currently implemented and as they would be implemented if the public landfill were in operation.

III. BURDENS ON INTERSTATE COMMERCE

14. By virtue of the broad geographic scope of economic activity in the United States, virtually any state or local law having an impact on local commerce will, in turn, have some effect on interstate commerce. Therefore, in this section, I will focus on whether the economic effects of the Local Laws bring about conditions that are relevant in considering the extent to which those laws burden interstate commerce. I will assess whether the laws have a differential impact on interstate commerce, that is, whether their impact on interstate commerce is different from (greater than) their impact on in-state commerce. This will include consideration of whether the laws have a greater impact on out-of-state entities, relative to similarly situated in-state entities, and

---

[5] *See* 'Memorandum Re: Status and Future Steps for Development of Proposed Regional Landfill,' Oneida-Herkimer Solid Waste Management Authority, December 31, 2002.

whether the Local Laws impact commerce beyond that which entities in the Counties would be directly involved in (i.e., whether they have an extraterritorial effect).

15. In evaluating the impacts of the Local Laws on interstate commerce, it is useful to divide the waste industry into four segments, based on the activity that occurs in those segments: waste generation; collection; processing prior to the final disposition of waste; and the final disposition of waste, such as through disposal in a landfill or recycling. By examining each of these segments in the following paragraphs, I address impacts of the Local Laws that could constitute a burden on interstate commerce.

16. The Local Laws pertain exclusively to waste collected in the Counties. Therefore, their impact on waste generators is limited to those generators in the Counties.[6] As I discuss in a later section, while the Local Laws indirectly impose financial costs on the Counties' waste generators, these costs are offset by financial and non-financial benefits that accrue both to the individual generators and to the Counties as a whole.

17. The Counties' laws affect firms that collect waste in the Counties. These firms face higher disposal costs for non-recyclable waste as well as other restrictions on their operations, such as the requirement to provide recyclables collection. Because this burden is faced by any entity that

---

[6] Dr. Berkman argues that the laws may cause some inefficiencies in waste collection in neighboring counties, which would, in turn, burden generators in those counties. This would result from the impact of the flow control laws on haulers whose operations extend beyond the two counties in such a way that operations in those counties directly affect operations in neighboring counties (e.g., actual collection routes cross county borders). Yet, Dr. Berkman has provided no specific factual evidence to suggest that these inefficiencies exist and are of a non-trivial magnitude. Nonetheless, while it is theoretically possible that the flow control laws could affect haulers and, in turn, waste generators in neighboring counties, they would not affect out-of-state generators.

collects waste in the Counties, it is likely to be passed on to waste generators in the form of higher prices. This was confirmed in plaintiff depositions.[7] Nonetheless, it is possible that some increased costs faced by collectors due to the waste management plan would not be passed on to their customers. Such burdens would be limited to a collector's operations in the Counties,[8] and there is no reason to believe they would be qualitatively or quantitatively different depending on whether a collector was an in-state or out-of-state business.

18. As the Local Laws require that all collected non-recyclable waste be brought to the Authority's transfer stations prior to ultimate disposition, the laws deny the opportunity for private businesses to process the Counties' waste prior to final disposal.[9] The laws essentially remove the Counties' waste from private commerce in this stage of the waste management process. Because all processing in preparation for long distance transport must be done locally, this burden clearly falls on in-state commerce.

19. In considering impacts on interstate commerce in regard to the final disposition of waste, it is worthwhile to address separately recycled and non-recycled waste. Through the

---

[7] *See* Examination Before Trial of Marcella Guerriero, Plaintiff, Taken By The Defendants, Pursuant To Notice, United States District Court Northern District of New York, December 17, 2002.; Examination Before Trial of Thomas Ingersoll, Plaintiff, Taken By The Defendants, Pursuant To Notice, United States District Court Northern District of New York, December 16, 2002.; Examination Before Trial of David Levitt, Plaintiff, Taken By The Defendants, Pursuant To Notice, United States District Court Northern District of New York, December 13, 2002.; Examination Before Trial of Kenneth Wittman and Joan Wittman, Plaintiffs, Taken By The Defendants, Pursuant To Notice, United States District Court Northern District of New York, December 10, 2002.

[8] *See* note 6.

[9] In this report, the term "processing" is used to describe the receipt of waste from local collectors, and subsequent preparation of that waste for transport to its final disposal site.

many means by which it encourages recycling, the Local Laws increase the availability, or supply, of recyclable materials for all entities that use those materials. In turn, this leads to greater interstate commerce in recyclables. Indeed, firms in numerous states and Canadian provinces have purchased the Counties' recyclable material. The increased availability of these materials would benefit local interests more than out-of-state interests only to the extent that they are geographically closer to the source of additional supply.

Economic effects on the waste disposal marketplace

20. The segment of the waste industry that I discuss in greatest depth is that involving disposal of non-recyclable waste. This segment is also the focus of Dr. Berkman's report. As currently implemented, the ultimate impact of the Local Laws does not impede interstate disposal of the Counties' waste. In fact, the Local Laws may have accelerated the growth in interstate shipments of the Counties' waste. This is suggested both by the economic effects of the Local Laws and by historical fact.

21. While the Local Laws deny collectors the right to directly send waste into the disposal marketplace, the ultimate demand for disposal in the interstate marketplace is largely unchanged. Demand for disposal from numerous collectors is replaced by the Authority's demand for disposal of roughly the same amount of waste. Total demand for disposal is reduced somewhat due to increased recycling and reduced waste generation, both of which are encouraged by incentives arising from flow control.[10] The ability of out-of-state disposal sites to meet that demand, relative to their in-state competitors, is in no way lessened by the laws.

22. After being processed at the Authority's transfer stations, the Counties' non-recyclable waste is transported to a disposal site by a contractor periodically chosen by the

---

[10] This is a significant social benefit of the system, as I discuss later.

Authority. While the choice of a contractor, and that contractor's disposal site(s), involves considerations beyond financial costs, including environmental considerations, it does not depend on whether the disposal site is inside or outside of New York State. Moreover, there is no reason to believe that the evaluation process would incidentally favor in-state over out-of-state sites, aside from costs associated with shipping waste greater distances. In fact, in 1991, the Authority chose a contractor that used an out-of-state landfill. As a result, from 1991 to 1998, the Counties' non-recyclable waste entered interstate commerce.[11,12] Indeed, the contention that the Local Laws burden interstate commerce appears dubious in light of this readily observable historical fact. Moreover, while the current contractor disposes of the Counties' waste in New York State, the Authority's agreement with the contractor allows for the disposal of waste at an out-of-state site.

23. An out-of-state landfill's ability to compete with a local landfill for a county's waste depends to a great extent on whether its disposal fees are low enough to justify the

---

[11] While the Counties continued to dispose of some waste locally at the Authority's energy recovery facility from 1991 to 1995, that facility shut down in 1995. From 1995 to 1998, all the counties' non-recyclable waste that was delivered to the Authority was shipped out-of-state. *See* United Haulers Association v. Oneida-Herkimer Solid Waste Management, Docket No. 00-7593, 00-7595, 00-7597, United States Court of Appeals for the Second Circuit, decided July 27, 2001; 'Memorandum Re: Disposal of Waste Before 1988,' Oneida-Herkimer Solid Waste Management Authority, January 7, 2003.

[12] It is worth noting that while flow control led to interstate shipments of the counties' non-recyclable waste from 1991 to 1998, certain haulers that violated the flow control laws during this period, by disposing of waste outside the Authority's system, disposed of waste in-state rather than outside New York. *See* Examination Before Trial of Kenneth Wittman and Joan Wittman, Plaintiffs, Taken By The Defendants, Pursuant To Notice, United States District Court Northern District of New York, December 10, 2002.

increased transportation costs of shipping waste to its site.[13] Hence, the extent of interstate commerce will depend on both transportation costs and the differences between disposal fees among sites in the various states. The additional transportation cost associated with using a more-distant site is determined by the incremental cost of shipping a given amount of waste one mile (the per-mile cost) and the additional distance that must be traveled. Therefore, the lower the per-mile cost of shipping waste, the lower the additional transportation costs are for using more-distant sites, and hence the greater the potential for interstate commerce.

24. The infrastructure in place for shipping waste in any county significantly affects per-mile transportation costs. Although transfer stations like those operated by the Authority require up-front capital expenditures to build, and on-going fixed operating costs to maintain, they substantially lower the per-mile cost of shipping waste. By making it possible to combine waste from multiple collection trucks for shipment in one, larger truck, transfer stations yield savings in labor, fuel, and equipment costs associated with transporting waste. Given the transfer stations that the Authority has put in place, it is unlikely that the per-mile cost of shipping the Counties' waste would be lower in the absence of flow control.[14] Thus, in the absence of flow

---

[13] While focusing on the use of landfills as a disposal method in this section, I recognize that other disposal options, such as incineration, are also available to the Authority and the private sector.

[14] In 2001, the Authority's two transfer stations together served as the point of origin for the shipment of more than 260,000 tons of waste. *See* 'Oneida-Herkimer Solid Waste Authority, 2001 Annual Report,' Oneida-Herkimer Solid Waste Management Authority, 2001. Conversations with Authority officials and an outside expert suggest that, given the size of this waste stream, there are little, if any, additional opportunities to reduce the per-mile cost of transporting the waste out of the Counties (Conversation with Jim Heil, January 6, 2003).

control, the ability of out-of-state disposal sites to attract the Counties' waste would not be any greater.

25. Not only is there no reason to believe that the Local Laws have limited interstate commerce, they may actually have accelerated the growth of interstate commerce. Prior to the enactment of flow control, little of the Counties' waste was shipped out of state, and the transfer station infrastructure that now exists was not in place.[15] Private haulers could have — and likely would have eventually — built transfer stations similar to those established by the Authority. Yet, their incentive to do so would not have been as great. The incentive for private haulers to build transfer stations results from the comparison of the costs associated with building and operating them to the benefits of greater disposal options and lower transportation costs. Because the Authority would have derived significant benefits from the transfer stations in *addition to* reduced transportation costs and greater disposal options — as the stations were integral to many aspects of the waste management plan — their incentive to build such stations was certainly greater. Therefore, in the absence of the Local Laws, the private sector may not have established transfer stations as early as the Authority did, and the per-mile cost of shipping waste from the Counties may not have declined as soon as it did (See Appendix C for a more complete explanation).

26. In addition, the Counties' waste management plan may have made interstate shipments more likely because of its commitment to balancing cost and environmental considerations in choosing a disposal site. The Pennsylvania landfill, where the Counties' non-recyclable waste was disposed of from 1991 to 1998, offered competitive disposal rates. Yet, shipping certain types of waste to a Pennsylvania

---

[15] *See* United Haulers Association v. Oneida-Herkimer Solid Waste Management, Docket No. 00-7593, 00-7595, 00-7597, United States Court of Appeals for the Second Circuit, decided July 27, 2001.

landfill also involved substantial upfront transaction costs to comply with Pennsylvania's environmental regulations, including requirements for costly waste audits.[16] These regulations were more stringent than those in New York State. Despite the competitive disposal rates, such transaction costs could have discouraged private haulers from shipping some of the Counties' waste to this disposal site, or any other Pennsylvania landfill. But, because of the Counties' focus on environmental considerations and related social benefits, they chose the Pennsylvania site despite the transaction costs that were thereby incurred.

27. Historical evidence is also consistent with the idea that the Counties' flow control promoted interstate commerce. Prior to 1991, nearly all of the Counties' waste was disposed of at several local landfills.[17] From 1991 to 1998, with the exception of a limited amount of waste that was incinerated locally at the Authority's energy recovery facility from 1991 to 1995, all of the Counties' non-recyclable waste that was delivered to the Authority's facilities was shipped to an out-of-state landfill. While I could not obtain records for earlier years, in 1997 and 1998, the Authority's shipments made up nearly all of the exports of waste from those areas of New York State that comprise the Department of Environmental

---

[16] In order to dispose of non-hazardous industrial waste in the Pennsylvania landfill, the Authority had to test and profile over 300 of the counties' industrial and commercial waste streams. These waste streams were then subject to cradle-to-grave tracking systems that documented the content of the waste, the chain of custody, how it was handled at each stage, whether it was commingled with other waste, and its condition upon delivery to the landfill. This procedure ensured the separation of types of waste that could be dangerous if combined. It also provided the counties' industrial and commercial waste generators with legal documentation of proper handling and disposal. See 'Memorandum Re: Environmental Review and Pennsylvania Solid Waste Management Regulations,' Oneida-Herkimer Solid Waste Management Authority, December 21, 2002.

[17] *See* 'Memorandum Re: Disposal of Waste Before 1988,' Oneida-Herkimer Solid Waste Management Authority, January 7, 2003.

Conservation's (DEC) Regions Four through Eight.[18] Together, these regions in upstate New York account for one quarter of New York State's population.

28. In his expert report, Dr. Berkman concedes that there have been interstate shipments of waste since the implementation of flow control, but asserts that "more landfills would be involved absent the single point of access created by the Flow Control Laws."[19] In making this argument, Dr. Berkman focuses on impacts on the *number* of out-of-state sites disposing of the Counties' waste as an indication of burdens on interstate commerce, rather than focusing on the *quantity* of waste being shipped across state borders or the *intensity* of interstate competition. Indeed, from 1995 to 1998, the amount of the Counties' waste entering interstate commerce was at its highest possible level even though only one out-of-state entity was involved in disposing of it.[20] Dr. Berkman has not made a compelling argument for why the *number* of out-of-state sites disposing of the Counties' waste should be a more important consideration than the actual *quantity* of waste going into interstate commerce. Indeed, were he to pursue his own line of argument, it seems he would also conclude that the entry of large, efficient, private landfills may actually harm interstate commerce if that entry foreclosed entry opportunities for more numerous, small, less-efficient landfills, because it would lead to disposal at fewer sites.

---

[18] *See* 'Where Will the Garbage Go? 1998,' New York State Legislative Commission on Solid Waste Management.; 'Where Will the Garbage Go? 1999,' New York State Legislative Commission on Solid Waste Management.

[19] *See* Expert Report of Mark Berkman November 15, 2002. page 8.

[20] As mentioned above, while an out-of-state landfill was used for disposal from 1991 to 1998, some of the counties' waste was incinerated locally from 1991 to 1995. *See* United Haulers Association v. Oneida-Herkimer Solid Waste Management, Docket No. 00-7593, 00-7595, 00-7597, United States Court of Appeals for the Second Circuit, decided July 27, 2001.

29. In summary; it is clear that, as currently implemented, the Local Laws do not impose a burden on interstate commerce that is *qualitatively or quantitatively different* from that on in-state commerce. In fact, it is unlikely that interstate shipment of the Counties' waste could be any more economically attractive in the absence of flow control; and interstate shipment of the Counties' waste may not have come about as quickly in the absence of flow control. Yet, in addition to addressing the impacts of the Local Laws as they are currently implemented, given that the Authority is in the process of permitting a public landfill, it is worthwhile to discuss the likely impacts of the Local Laws in the event that the landfill is built and operated.

Impact of the proposed landfill on interstate commerce

30. The proposed public landfill would remove the Counties' waste from private-sector commerce, reducing demand for disposal at any private site regardless of whether that site is in-state or out-of-state. Nothing in the nature of this demand reduction suggests there would be a differential effect on out-of-state landfills relative to in-state landfills. The direct burden this places on a given landfill depends on whether that landfill would have been likely to receive the Counties' waste in the absence of flow control. Therefore, the relative impact of this demand reduction on interstate commerce, at a given point in time, would be determined by the extent to which landfills that would have received the Counties' waste in the absence of flow control happen to be located outside New York.

31. Although it is not possible to determine definitively what share of waste would be disposed of out-of-state in the absence of the Local Laws, several factors suggest that little, if any, would be disposed of outside New York. First, only 0.5 percent of the waste exported from New York State in 2000 originated north or west of Sullivan, Ulster, and Dutchess Counties (see Exhibit 1). Moreover, that 0.5

percent was exported from counties in the extreme west of New York State.[21] Second, while Oneida and Herkimer Counties' waste was exported from 1991 to 1998, the fact that a competitive bidding process has resulted in the Counties' waste currently being disposed of at an in-state disposal site suggests that that landfill would be a likely recipient of much of the Counties' waste even in the absence of the Local Laws. Indeed, only that landfill stands to lose business directly if the proposed public landfill is built.

Impacts of widespread adoption of flow control on interstate commerce

32. Dr. Berkman's final rgument about the impact of the Counties' Local Laws on interstate commerce goes well beyond the impact of the Counties' system and considers what would happen if that system were widely adopted across and throughout the United States. He concludes that "the Counties' Flow Control laws, especially once fully implemented, if widely followed by other local governments, would severely restrict or eliminate interstate commerce."[22]

33. Dr. Berkman's argument fails to distinguish between municipalities that, in adopting flow control, would build new local public disposal facilities, and those that would just build public transfer stations, using flow control to achieve the desired public benefits while still relying on the private, interstate marketplace. Of course, the Authority took the latter approach in 1991. As I mentioned above, in deciding whether it will build a public landfill, the Authority will weigh any increase in costs that such an approach entails —

---

[21] Long Island and New York City were the source of 89 percent of New York's exported waste, and slightly more than 10 percent of New York's exported waste originated in the 7 counties immediately north of New York City. *See* 'Where Will the Garbage Go? 2001,' New York State Legislative Commission on Solid Waste Management, April 2002. <http://assembly.state.ny.us/comm/SolidWaste/20020513/#Tables>, visited December 22, 2002.

[22] *See* Expert Report of Mark Berkman November 15, 2002. page 9.

relative to continuing to rely on the interstate marketplace — against the public benefits such a landfill could yield above and beyond those provided by private disposal options. Therefore, the degree to which widespread adoption of the Counties' waste management approach would result in more public landfills depends significantly on any cost advantage of continuing to rely on the interstate marketplace. Flow control laws do not alleviate problems of facility siting. If they adopted flow control, municipalities with high population densities and without suitable, undeveloped land would likely continue to rely on private landfills, which may involve interstate shipments. Hence, widespread adoption of the Counties' waste management approach and associated flow control does not imply widespread construction of public landfills. The fact that the public benefits of flow control directing waste to a public landfill may exceed their costs in Oneida and Herkimer Counties does not imply that the benefits would exceed costs in every county. In the following paragraphs, I will separately address the implications of widespread adoption of flow control that only involves construction of public transfer stations, and that which involves the construction of local public landfills.

34. I have already established that, given the manner in which the Local Laws are currently implemented, it is unlikely that interstate shipment of the Counties' waste could be any more economically attractive, and that flow control may actually have had a positive impact on interstate commerce. The Local Laws led to the delivery of waste to publicly funded transfer stations; and I have found no evidence to suggest that the absence of flow control could have brought about lower costs of — and thereby greater incentives for — interstate waste transportation than is made possible by those stations. Moreover, interstate shipments may have come about earlier than would have been the case in the absence of flow control. Were more municipalities to implement flow control in the manner that the Authority has

implemented it, inevitably some would build transfer stations that private firms would not find it profitable to build. These publicly funded transfer stations would facilitate the interstate shipment of waste that was previously disposed of locally. Therefore, widespread adoption of the Local Laws, as currently implemented, may lead to increased interstate commerce and increased competition in the waste disposal marketplace.

35. Widespread adoption of flow control that involves the construction of public landfills would have effects similar to those if the Authority were to construct its proposed landfill. Nothing in the nature of the resulting reduction in demand for private sector waste disposal would suggest that there would be a differential impact on interstate, relative to in-state, commerce. The extent to which the two are reduced would largely depend on the relative share of interstate and in-state commerce in the marketplace for waste disposal. It is estimated that just ten percent of municipal solid waste in the United States enters interstate trade.[23] Therefore, there is no doubt that the removal of waste disposal from private commerce, that would accompany widespread building of public landfills, would have a quantitatively *greater* impact on in-state, rather than interstate private commerce.

Extraterritorial impacts on interstate commerce

36. It is also worthwhile to consider the impacts on municipalities that would continue to rely on private-sector waste disposal in the event that the building of public landfills, and associated flow control, were widely adopted. Given that the supply of private landfill capacity cannot quickly adjust to a reduction in demand — that is, it is relatively fixed in the short-term — the resulting reduction in demand for disposal at private landfills would likely lead to a reduction in disposal fees for those that continue to dispose

---

[23] Porter, R., *The Economics of Waste*, Resources for the Future, Washington D.C. 2002. page 103.

of waste in the private-sector marketplace. In other words, rather than placing an extraterritorial burden on those communities continuing to rely on interstate disposal of their waste, widespread adoption of flow control and building of public landfills would reduce their disposal costs.[24]

Summary

37. The Local Laws affect local waste generators, haulers, and potential local processors of waste by increasing disposal costs for haulers, and hence generators, and bringing waste processing prior to final disposal into the public sector. Yet, as they are currently implemented, the Local Laws only reduce the ultimate demand for waste disposal in the private, interstate marketplace by the degree to which they lead to increased recycling and reduced waste generation. The process by which bids are evaluated for disposal of the Counties' waste in the private-sector marketplace confers no advantage on in-state interests relative to out-of-state interests. In fact, the implementation of the Local Laws may have accelerated the growth of interstate commerce, and it has resulted in an incentive for interstate disposal that is likely to be as great as that which would exist in their absence. In the event that the Authority does build a public landfill to which it directs all of the Counties' waste, the result would be a reduction in private commerce in waste disposal — a reduction that would have a greater effect on in-state rather than out-of-state landfills. *In conclusion, the Local Laws, with or without the proposed public landfill, do not place a qualitatively or quantitatively greater burden on out-of-state interests, relative to similarly situated in-state interests. Moreover, there is no evidence to suggest that the Local Laws place any extraterritorial burden on interstate commerce.*

---

[24] This result is found in scholarly research on the impact of flow control. *See* Ley, E., Macauley, M., and Salant, S., 'Restricting the Trash Trade,' *American Economic Review*, Vol. 90, Issue 2, 2000. pages 243-246.

IV. PUBLIC BENEFITS

38. The Local Laws are an integral part of the waste management plan implemented by the Authority. It is my understanding that this plan is meant to ensure that the Counties' waste is addressed in a manner that maximizes local public benefits. The general nature of the benefits sought can be found in the objectives of the Local Laws, described in Robert Julian's affidavit, which include:[25]

- Providing reliable waste management service while protecting public health, safety, and welfare.
- Replacing high volume, undifferentiated waste disposal methods with a system that would match the best management method to each component of solid waste.
- Making waste reduction and recycling legally mandated top priorities for solid waste management.
- Establishing and expanding markets for recyclables.
- Conserving vital natural resources.

39. In this section, I establish evidence both that these are indeed legitimate public benefits, and that the Counties' plan has significantly contributed to achieving them. In a subsequent section, in which I discuss alternatives to flow control, I make clear how flow control plays an integral and ultimately necessary role in allowing the Counties' plan to achieve these benefits.

The social benefits in the objectives sought by the Authority

40. The fact that the Local Laws' objectives represent legitimate public benefits, justifying local government involvement, can be established not only by appeal to

---

[25] *See* Affidavit in Opposition of Robert Julian, July 5, 1995. pages 23-24.

developments in solid waste policy at the national and state level, but also by appeal to the economics underlying the objectives. It is essential to note a particular economic characteristic of many of the outcomes that the plan promotes: the presence of what economists call "externalities." An externality is present whenever either the cost or benefit to society as a whole that results from a particular activity is different from the private costs or benefits experienced by the individuals making decisions about the activity.[26] For example, when an individual engages in recycling or appropriate disposal of household hazardous wastes,[27] the overall social benefit arising from the activity will be greater than the benefit s/he directly derives from that activity. This is because, while s/he clearly benefits from disposing of unwanted waste, others may also benefit from the reduced environmental impacts that her/his decision to recycle or appropriately dispose of hazardous waste brings about. Because individuals may not take into account these impacts on others in choosing how to dispose of waste, in the absence of government intervention, even if the social benefits of recycling or appropriate disposal of hazardous waste exceed their costs, individuals responding to solely *private* incentives may not engage in those activities unless the private benefits they derive exceed the private costs they incur. Therefore, without government intervention, certain

---

[26] For a given activity, an externality is specifically defined as the difference between its benefit (cost) to society as a whole and its benefit (cost) to the individuals actually engaged in the activity. See Stiglitz, J., *The Economics of the Public Sector*, W.W. Norton and Company, New York, 2000. pages 214-217.

[27] Throughout this report, I refer to "appropriate" or "proper" disposal of household hazardous wastes. In so doing, I am distinguishing proper disposal from legal disposal. While, in some cases, it may be legal to dispose of these wastes in the trash, proper disposal can be taken to mean the disposal method that minimizes environmental risk, such as bringing the waste to a designated household hazardous waste collection facility. Other improper disposal methods include pouring liquid hazardous wastes down the drain.

activities involving externalities may not take place to the extent that is socially desirable. Moreover, many of the social benefits derived from these activities may not be financial in nature. For example, while perhaps yielding no revenues, an expanded household hazardous waste program results in increased environmental protection by making it easier for small quantity generators to properly dispose of those wastes, and thereby increasing the likelihood that they will do so.

41. Two important implications arise from the presence of externalities in outcomes promoted by the Counties' plan. First, their presence justifies government involvement. While federal and state government involvement, such as regulation of landfills, may respond to some externalities associated with waste management, local government involvement remains necessary. Such local government involvement can both reinforce federal and state involvement and address externalities that are of a particularly local nature. Second, even if the social benefits of government efforts to promote certain activities exceed their costs, much of the social benefits may not be financial in nature. Therefore, the financial benefits of some socially desirable government efforts may be less than their financial costs.

42. Dr. Berkman does not appear to appreciate the presence of externalities in assessing the public benefits of the Counties' waste management system. At one point, Dr. Berkman seems to call into question whether the Counties are achieving benefits from flow control because the Authority's household hazardous waste, composting, and materials recovery facilities have operated at a financial loss in most years.[28] As discussed above, these programs are supported by the system charge on non-recyclable waste and are not structured to generate fee revenue, but to encourage greater separation and delivery of material. Desirable government activities that are socially beneficial because

---

[28] *See* Expert Report of Mark Berkman, November 15, 2002. Exhibit 6.

they are designed to address externalities will not necessarily be financially profitable.

43. Having discussed the economic arguments that establish the Counties' objectives as legitimate public benefits, in the following paragraphs I will discuss the extent to which the Counties' waste management plan is achieving those public benefits. The Authority and the Counties identify a broad range of benefits provided by the Local Laws and the solid waste management plan, along with specific examples and measures of how the plan is achieving those benefits.[29] These include, among others, benefits related to planning and administration, public participation and public education, recycling, composting, and environmental security. In the following paragraphs, I will highlight a few benefits that demonstrate both the presence of externalities in the actions promoted by the plan and the extent to which the Counties' plan has led to a high-level of achievement of those actions.

Recycling

44. One of the main objectives of the waste management plan is to maximize recycling. Not only is this goal consistent with New York State's waste management hierarchy, but the public benefits, or positive externalities, associated with recycling have been examined by numerous scholarly and government studies. These externalities include those environmental benefits that arise from reductions in the amount of waste landfilled — as well as the actual number of landfills built — and reductions in the extraction of natural resources.[30,31] In addition, research has found that individuals

---

[29] The Authority and the counties comprehensively identify these benefits in their response to the plaintiffs' interrogatories. *See* Response to Plantiffs' Interrogatories, United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Authority, CV-95-0516, United States District Court Northern District of New York, August 30, 2002.

[30] While environmental regulations established during the 1980s have significantly reduced the environmental damages associated with landfills, several environmental externalities remain. The magnitude of

place a significant value on having recycling opportunities available to their community.[32]

45. The Counties' waste management plan and the Local Laws have facilitated a high level of recycling. The success of the Counties' recycling program can be seen in a number of ways. Oneida County was the second county in the state to adopt mandatory recycling laws and, together, the Counties have since continued to enhance their recycling capacity. The Authority accepts and recycles over 33 different types of waste products, including oils, paints, batteries, electronic components and particular grades of paper and plastic products which are not commonly recycled by other public or private waste management programs.[33] Its recycling efforts

---

some externalities, such as greenhouse gas emissions, is related to the amount of waste disposed of in landfills. Other externalities, such as those associated with negative impacts on nearby property values, are related to the actual number of landfills built. Still others are related to a combination of both factors, such as the possibility for contamination of land or groundwater despite existing landfill regulations. *See* Porter, R., *The Economics of Waste*, Resources for the Future, Washington D.C. 2002. pages 64-60, 133-139.; Kinnaman, T., 'Explaining the Growth in Municipal Recycling Programs,' *Public Works Management and Policy*, Vol. 5, No. 1, July 2000. pages 37-51. reprinted in Kinnaman, T., and Fullerton, D. *The Economics of Household Garbage and Recycling Behavior*, Edward Elgar, Northampton, MA. 2002. pages 153-167.; 'Are We Throwing it all Away? A Call for New York to Recommit to Recycling,' Office of New York Attorney General Eliot Spitzer, May 1, 2000, <http://www.oag.state.ny.us/ press/reports/recycling/recycling.html>, visited January 5, 2002.; 'Municipal Solid Waste (MSW): Basic Facts,' Environmental Protection Agency, <http://wvvvv.epa.gov/epaoswer/nonhw/muncpl/ facts.htm>, visited November 12, 2002.

[31] Environmental benefits associated with reduced extraction of natural resources include reduced habitat destruction and reductions in pollution that may accompany such extraction.

[32] *See* Kinnaman, 2002.

[33] *See* 'Items Recycled by Oneida-Herkimer Solid Waste Authority and Which May Not Be Recycled By Other Counties,' Oneida-Herkimer Solid Waste Management Authority, 2002.; 'Oneida-Herkimer Solid Waste Authority System Improvement Schedule,' Oneida-Herkimer Solid

have received attention in the trade press and, in 2001, the Authority was formally recognized for its efforts by the Governor's Waste Reduction and Recycling Program Achievement of Excellence Award.[34]

46. In his expert report, Dr. Berkman seeks to question the extent to which the Counties' laws have contributed to recycling and composting by presenting a table that compares the Authority's recycling rates to those of other New York State solid waste management planning units.[35] To construct this table, Dr. Berkman uses data from *The New York State Recycling Bulletin 1999 Edition*, a New York DEC publication.[36] Yet, for two key reasons, the data in this publication can neither be used to provide an accurate assessment of Oneida and Herkimer Counties' recycling success relative to other planning units, nor to measure the extent to which Local Laws have increased recycling rates: (1) the various planning units' data are incomparable and subject to significant error; and (2) any comparisons that are nonetheless attempted fail to consider the effects of factors that influence recycling rates other than government initiatives. First, the types of waste that planning units count in estimating the amount of waste generated prior to recycling — the denominator in a calculation of the recycling rate — varies across planning units.[37] For example, some

---

Waste Management Authority, April 2001; Patrick, M., 'Oneida Co. Oks Recycling Law,' *Observer Dispatch*, Utica N.Y., Thursday, July 28, 1988. pages 1A and 8A.

[34] *See* Pataki, G., '2001 Governor's Waste Reduction and Recycling Program Achievement of Excellence Award,' The State of New York Governors Office, October 22, 2001.

[35] *See* Expert Report of Mark Berkman, November 15, 2002. Exhibit 8.

[36] *See* 'The New York State Recycling Bulletin 1999 Edition,' New York State Department of Environmental Conservation, <http://www.dec.state.ny.us/website/dshm/redrecy/bulletin 99.pdf>, visited December 31, 2002.

[37] This was determined by an assessment of the raw data that some planning units provided to the DEC and by information provided by

planning units report sewage sludge, while others do not. In addition, while some planning units, such as the Authority, are significantly involved in day-to-day waste management and can produce waste generation and recycling estimates based on actual data, other planning units that are less involved must estimate these data. Not only does this lead to significant variation in the quality of data reported but, in at least one case, this estimation proved so difficult that a planning unit did not report an entire category of waste.[38] Such variation in both the accuracy and nature of data being used by Dr. Berkman make any comparison of resulting recycling rates subject to substantial error.

47. Putting aside this significant problem, Dr. Berkman's comparison of recycling rates fails to take into account significant differences among planning units that can cause recycling rates to vary dramatically among those units. Among the differences are the relative share of residential and commercial waste in a planning unit's waste stream and the type of businesses located in a planning unit. Certain types of businesses will have a higher percentage of easily recyclable material in their waste streams than others.

---

administrators of planning units. *See* Chemung County Annual Recycling Report, New York State Department of Environmental Conservation, 1998.; Fulton County Annual Recycling Report, New York State Department of Environmental Conservation, 1998.; Oneida-Herkimer Counties Annual Recycling Report, New York State Department of Environmental Conservation, 1998.; Western Finger Lakes Annual Recycling Report, New York State Department of Environmental Conservation, 1998.

[38] Sharon Lilla, Administrator of the Western Finger Lakes Authority, informed me that she did not include non-hazardous industrial waste in her calculation of waste generated because, given the information available to her, she had little ability to provide a reliable estimate. This category of waste made a non-trivial contribution to overall waste generation in other planning units. *See* Lilla, S. 'Memorandum Re: NYS DEC Reporting,' Western Finger Lakes Solid Waste Management Authority, January 6, 2003.

48. For the same reason that Dr. Berkman's exhibit cannot be used to compare the success of various counties in promoting recycling, it also cannot be used to indicate the impact of flow control on recycling rates in Oneida and Herkimer Counties. The appropriate question to ask in determining the role of flow control in promoting recycling is: how much lower would recycling rates be in Oneida and Herkimer Counties in its absence? By presenting his exhibit, which shows some planning units with higher recycling rates that did not employ flow control, Dr. Berkman seems to be suggesting that the Counties' recycling rates could be as high or even higher in the absence of flow control. Yet, for the reasons cited above, such a conclusion cannot be made by a simple comparison of the Counties' recycling rate with that of other planning units. A proper analysis would have to control for other factors, some of which are mentioned above, that also affect recycling rates. Then and only then could a proper analysis estimate the impact of flow control on recycling rates. Since such an analysis has not been carried out, the degree to which the Counties have maximized recycling must be judged in more qualitative terms, such as I have described above. Moreover, the particular role of flow control can also be considered by assessing the unique incentives that it creates for recycling, as I do in the next section.

Reduction in waste generation

49. By charging tipping fees for non-recyclable waste that support all waste system components, and not charging fees for delivery of recyclables, the Counties' plan provides greater incentives not only for complying with recycling laws, but also for reductions in the generation of waste. Such reductions lead to many of the same public benefits as recycling. The heightened incentives presented by higher tipping fees for non-recyclable waste encourage residents, businesses, and haulers to find innovative ways to reduce the amount of waste that is generated. For example, higher

tipping fees have likely contributed to decisions by large waste generators in the Counties — including hotels, institutions, and industrial facilities — to seek out waste reduction, reuse and recycling opportunities, efforts that have been aided by the Authority.[39]

50. In like manner to his contention regarding the Counties' recycling rates, Dr. Berkman's suggestion that the Authority has been unsuccessful in encouraging reductions in waste generation is based on a misleading comparison of New York State planning units' per capita waste levels.[40] Because it relies on data from the same source, the comparison is flawed for the very same reasons I have described above for Dr. Berkman's comparison of recycling rates.[41]

Household hazardous waste

51. Through its household hazardous waste collection system, the Counties' waste management plan has excelled in promoting the local environmental benefits arising from the reduced likelihood that individuals will improperly dispose of hazardous waste. While there are clear environmental benefits associated with proper disposal of hazardous wastes, individuals making the disposal decisions may only directly enjoy, and thereby consider, some of those benefits. Environmental benefits may also be enjoyed by others. For example, a neighbor may have a reduced risk of well water contamination if an individual properly disposes of a hazardous liquid rather than pouring it down the drain. Moreover, in many communities, hazardous waste collection

---

[39] Utica Metal Products informed me that the higher tipping fees have played a large role in motivating its waste reduction and recycling efforts.

[40] *See* Expert Report of Mark Berkman, November 15, 2002. Exhibit 9.

[41] In this case, not only are the exhibit's data incomparable, but in at least one case they are also incorrect. Dr. Berkman reports that Franklin County has the lowest per-capita waste generation. Yet, the population he reports for that county, 216,000, while consistent with the New York State DEC report he cites, is overstated by a factor of 4 according to the U.S. Census, which estimates its population at 51,134 in 2000.

opportunities are infrequent, making it more difficult — and hence costly — for individuals to properly dispose of hazardous waste. Together, these factors indicate that individuals may not properly dispose of hazardous wastes to the degree and in the manner that is socially desirable. The Authority has continually made strides to reduce the difficulty of proper disposal, including expanding its collection operation to six days per week in 2001. In addition to this household hazardous waste program, the waste audits of businesses and institutions — conducted by the Authority, and likely encouraged by the heightened incentives for waste reduction and recycling — provide a valuable opportunity for the identification of hazardous waste and development of appropriate disposal methods.

Human health, the environment, and environmental liability

52. The Counties' waste management plan also increases protection of human health and the environment through its control of the means and location of disposal for the Counties' non-recyclable waste. There are three reasons why the Counties' plan adds to such protection, in light of existing state and federal regulations. First, while federal regulations offer a significant level of protection, they by no means offer complete protection. Second, the stringency of state regulations varies.[42] Finally, the enforcement capacity of regulatory bodies and compliance with regulations by disposal sites also varies. Consequently, disposal sites are clearly left with the opportunity to differentiate themselves based on their environmental impacts, and the Authority seeks to choose a disposal option for the Counties' non-

---

[42] The Resource Conservation and Recovery Act (RCRA) specifically grants states and political subdivisions thereof the authority to impose waste management regulations that are more stringent than federal standards (Title 42, Chapter 82, Subchapter III, Sec. 6929, "Retention of State Authority").

recyclable waste that ensures maximum protection of human health and the environment.

53. It is important to note that this aspect of the Counties' waste management plan yields both environmental benefits and direct financial benefits to the Counties. The former benefits are clear. Not only do the Authority's environmental considerations reduce the likelihood that the Counties' waste may damage the environment, but, due to the volume of its waste, it creates a significant incentive for disposal sites to improve the environmental protections they have in place. The direct financial benefits arise from the reduced likelihood that the Counties' waste will contribute to what may one day become a contaminated site, an outcome that could impose financial liability on the Counties' waste generators. The defendants' counsel has informed me that, pursuant to federal and state environmental laws, if a landfill is determined to require remediation due to the presence of hazardous substances, with minor exceptions, any residential commercial, or industrial solid waste generator whose waste was delivered to that landfill may be held jointly and severally liable for the costs of investigation and remediation if their waste may have contained any of a broadly-defined set of hazardous substances.[43] This is the case regardless of whether or not they knew or controlled where the waste was taken and regardless of whose hazardous substances were the cause of the determination that remediation is required. As I mentioned above, prior to the implementation of the Counties' waste management plan, many of the Counties' businesses and institutions faced financial liability due to contamination at a local landfill.

54. In the process of choosing a contractor for disposal of the Counties' waste, the Authority has expended significant resources evaluating the environmental consequences of that

---

[43] *See* Drabicki, J., 'Memorandum Re: Assumptions for Expert Report Regarding CERCLA Liability,' December 23, 2002.

choice.[44] It is unlikely that private waste haulers or waste generators would expend similar effort.[45,46]

55. Referring to an EPA report on flow control, Dr. Berkman contests the human health and environmental benefits of the Counties' waste management plan and Local Laws.[47] First, it is important to note that, in making this argument, Dr. Berkman draws from a portion of the EPA report that strictly addresses disposal of waste at landfills or incinerators.[48] Aside from its impact on the final disposal of the Counties' non-recyclable waste, the Authority's plan offers protection of human health and the environment through, among other programs, its household hazardous waste collection. Second,

---

[44] Authority has informed me that prior to awarding its first disposal contract in 1991 to a Pennsylvania landfill, the Authority directed its consulting engineers and geologists to conduct a site investigation and to review the landfill's environmental impact statement and permit documents. In addition, Authority staff met with the Pennsylvania Department of Environmental Protection prior to awarding the contract. *See* 'Memorandum Re: Environmental Review and Pennsylvania Solid Waste Management Regulations,' Oneida-Herkimer Solid Waste Management Authority, December 21, 2002.

[45] This was confirmed in at least one deposition of a plaintiff. *See* Examination Before Trial of Kenneth Wittman and Joan Wittman, Plaintiffs, Taken By The Defendants, Pursuant To Notice, United States District Court Northern District of New York, December 10, 2002.

[46] Even if the Authority's efforts to gather information on the environmental impacts of its disposal site may be beneficial on the whole for the counties' waste generators, the same generators would not be expected to seek that information on their own. While this information may be costly to gather, once gathered, its benefits can be shared with all waste generators without cost. Therefore, while for each generator the benefits of gathering this information may not outweigh the cost of doing so, the benefits enjoyed by all the Counties' waste generators may far outweigh the cost to the Authority of collecting and sharing the information. Put simply in terms of conventional economics, public goods tend to be under-provided by ordinary private markets.

[47] *See* Expert Report of Mark Berkman, November 15, 2002, page 22.

[48] *See* 'Flow Controls and Municipal Solid Waste,' Environmental Protection Agency Report to Congress, The Office of Solid Waste, Municipal and Industrial Solid Waste Division, March 1995, page II-5.

the EPA report to which Dr. Berkman refers specifically states that, "There is no evidence that flow control either positively or negatively impacts the statutorily assured level of environmental protection, because the underlying regulatory requirements are controlling."[49] Yet, the Local Laws do affect the degree of achievement of the statutorily specified level of environmental protection because compliance can vary across disposal sites. Moreover, the Local Laws allow the Counties' to seek disposal in states with more stringent statutes and to seek environmental protection levels beyond that which is statutorily specified.

56. Dr. Berkman's attempt to refute the benefits arising from the reduced potential for environmental liability is both irrelevant and misleading. Dr. Berkman does not seem to question the ability of a business, individual, or government to reduce the potential for environmental liability through actions such as those taken by the Authority. Instead, he focuses on whether government-run facilities have offered a reduced likelihood of environmental contamination, and resulting liability, relative to private facilities. In so doing, he points out that "a large percentage of municipal landfills that have become Superfund sites were publicly run."[50] Yet the relevance of this conclusion is unclear as the Authority's waste management plan has thus far relied on private landfills for disposal. It has focused on choosing a site that offers the least likelihood of creating a future environmental liability, regardless of whether it is publicly or privately run. Moreover, while Dr. Berkman brings attention to the number of publicly owned landfills that have become Superfund sites, he fails to point out that the very statistics he relies on

---

[49] Ibid. page 11-5.

[50] *See* Expert Report of Mark Berkman, November 15, 2002. page 20.

indicate that a much greater percentage of private landfills became Superfund sites than did public landfills.[51]

V. ALTERNATIVES TO THE COUNTIES' FLOW CONTROL LAWS

57. Flow control is one element of the Counties' integrated solid waste management plan. Therefore, in evaluating alternatives to flow control, it is essential to consider the mechanisms by which it contributes to the benefits of the plan, and whether the same level of benefits can be achieved effectively through alternatives. There are five critical elements to consider:

- Flow control guarantees that all of the Counties' waste will be subject to the Authority's plan, including decisions about the appropriate disposal of non-recyclable waste, which is influenced by the Counties' commitment to protecting human health and the environment.
- Flow control creates financial incentives for waste reduction and recycling.
- Flow control facilitates enforcement of the waste management regulations and laws.

---

[51] The statistics in Exhibit 7 of Dr. Berkman's expert report show that, throughout the United States, 30.7 percent of landfills on the Superfund National Priority List in 1990 were privately owned. Yet, historically private landfills represented an even smaller percentage of *all* landfills. While the percentage of all landfills that were privately owned grew during the past few decades, by 1984 it had only reached 17 percent. *See* Repa, E., 'Solid Waste Disposal Trends,' *Waste Age*, April 1, 2000. Therefore, the fact that 30.7 percent of landfills on the Superfund List were private suggests that privately owned landfills were disproportionately more likely to become Superfund sites than publicly owned landfills. If a public and private landfill were just as likely to become Superfund sites, then the share of all Superfund landfills that were private should match the share of all landfills operated prior to 1990 that were private. Dr. Berkman's exhibit shows that this is not the case.

- Flow control offers a unique means of financing the Authority's solid waste management programs.
- Flow control produces information that is valuable for other elements of the Authority's waste management plan.

58. Having the Authority take over collection of solid waste in the Counties would be one alternative that could likely achieve the same public benefits as flow control. Yet, this would impose an even greater burden on private commerce, since private haulers now collecting in the Counties would be displaced, and all waste collected by public employees or contractors would continue to be delivered to Authority facilities. Consequently, the burden it imposes on interstate commerce would be no less than that resulting from the existing Local Laws. As the *Pike* test requires consideration of alternatives that impose a lesser burden on interstate commerce, the discussion below focuses on whether other feasible alternatives exist.

59. By dictating the flow of the Counties' waste, the most direct benefit of flow control that cannot be achieved through alternatives is that it ensures that all of the Counties' waste is subject to the Counties' waste management plan. A significant aspect of this plan is the Authority's decision as to what disposal option for the Counties' non-recyclable waste achieves the best balance of cost considerations and the desire for protection of human health and the environment above and beyond that which can be assured by the state and federal regulations.

60. Flow control also makes possible financial incentives for waste reduction and recycling that are unachievable through other means. The price of disposing of recyclable material, relative to that of recycling it, affects individuals' incentives to recycle. Simply subsidizing recycling cannot create the same difference in relative prices that comes with also increasing the price of waste disposal. Yet, without flow

control, the recyclable/non-recyclable price differential present in the Counties could not be sustained because haulers would simply respond by bringing their waste to disposal sites with lower prices. Due to the difference between the price of recycling and of disposing of waste that results from the Counties' system charge, waste haulers have a greater incentive to ensure that their customers are properly separating recyclable material from their non-recyclable waste. In addition, the higher tipping fee for non-recyclables waste creates a greater incentive for individuals, businesses, and other entities to find ways to reduce, reuse, and recycle their waste.

61. The Authority's capacity to enforce the Counties' waste management laws is a significant determinant of the incentive facing waste generators and haulers to comply with them. By ensuring that all of the Counties' non-recyclable waste is brought to the Authority's facilities, flow control significantly increases the ability of the Authority to enforce the laws. As a result, flow control likely increases recycling, composting, and appropriate hazardous waste disposal. Were haulers able to bring their waste to any disposal site, an equal level of enforcement would be much more costly — if not impossible — to achieve. Indeed, the negative impact on the Authority's enforcement capabilities posed by haulers disposing of waste outside the Authority's system was highlighted in testimony at an Authority hearing regarding haulers that violated the recycling laws.[52] An examination of penalties levied by the Authority since 1993 indicates that the Authority used the enhanced enforcement ability that is made possible by flow control.[53] Moreover, the fact that penalties

---

[52] *See* Hearing of Oneida-Herkimer Solid Waste Management Authority Board Regarding Violations of the Local Solid Waste Management Laws by Waste Systems International and Waste Stream, September 27, 1999, pages 10-23.

[53] The Authority has levied more than $100,000 in fines since 1993 for the disposal of waste that includes too great a percentage of recyclable

have declined in recent years may indicate that compliance by haulers has consequently been improving. Dr. Berkman's suggestion that the Authority's recycling goals could be achieved by regulation alone does not take into account the role of enforcement in determining the level of compliance with such regulations.

62. In his expert report, Dr. Berkman also states that "The EPA ... found that flow control was not necessary to meet [waste reduction and recycling] priorities."[54] To support this claim, he draws from language in the EPA report on flow control, which states that "there are no data showing that flow controls are essential ... for the long term achievement of State and local goals for source reduction, reuse and recycling."[55] Yet, based on my reading of the EPA report, Dr. Berkman's interpretation of the EPA's finding fails to take into account the means by which EPA reached its conclusion, and thus its potential applicability to Oneida and Herkimer Counties. EPA's conclusion stems from its finding that few municipalities were using flow control to meet their recycling goals. In other words, the logic behind EPA's conclusion is essentially the following: relatively few municipalities are relying on flow control to meet their recycling goals, hence flow controls must not be essential for them to meet their goals. Such a conclusion cannot be used to comment on whether two particular counties with very aggressive recycling goals can reach those goals in the absence of flow control. Indeed, EPA carefully states "The Agency recognizes that local circumstances (affecting the need for flow controls) may differ substantially from the

---

material. *See* 'Penalties Charged on Loads of Solid Waste Containing Recyclables,' Oneida-Herkimer Solid Waste Management Authority, 2002.

[54] *See* Expert Report of Mark Berkman November 15, 2002. page 21.

[55] *See* 'Flow Controls and Municipal Solid Waste,' Environmental Protection Agency Report to Congress, The Office of Solid Waste, Municipal and Industrial Solid Waste Division, March 1995. page ES-6.

national perspective."[56] In summary, flow control makes significant contributions to the achievement of recycling and waste reduction that cannot be made by alternatives that allow haulers to dispose of waste at any facility.

63. Flow control also offers a unique means of financing the Authority's programs. Political and organizational considerations may make it desirable for the Authority to be a financially self-sufficient system with a direct funding source, as opposed to relying on annual appropriations from general tax revenues. Moreover, an important consideration in any decision regarding public financing is equity. Of course, a determination of whether a public financing mechanism establishes an equitable means of collecting funds requires a definition of equity, something on which there is not common agreement. Therefore, I will defer to the definition of equity chosen by the Counties in the context of funding its waste management system: having waste generators fund the system in proportion to the amount of non-recyclable waste they generate.[57] I am unaware of any feasible alternative that offers such equity in funding. The only other means of guaranteeing this equity in funding would be to tax non-recyclable waste generation or waste collection in the town on a per-ton basis. Not only would neither of these alternatives be administratively feasible, the defendants' counsel has informed me that neither the Authority nor the Counties have the legal ability to levy such taxes.

64. By bringing the processing of waste into the public sector under the same Authority that oversees other parts of the integrated waste management system, flow control makes available to those other parts of the system better and more timely information regarding waste generation and the processing and disposal market. This information can then be

---

[56] Ibid. page ES-2.

[57] *See* Affidavit in Opposition of Robert Julian, July 5, 1995. page 33.

used to improve those other parts of the waste management system. For example, better knowledge of the waste stream can improve decisions about future recycling efforts or improve the Authority's ability to consult with local entities on their internal waste management practices.[58] This information might be gathered through alternative means, such as surveys of collectors and waste generators, but these alternatives are unlikely to produce information of similar quality.

VI. CONCLUSIONS

Burdens on interstate commerce

65. The Counties' Local Laws, as currently implemented, *do not place a qualitatively or quantitatively greater burden on out-of-state interests*, relative to similarly situated instate interests. Indeed, there is reason to believe the Counties' waste management plan and associated flow control may have *increased* interstate commerce in waste disposal relative to what would have occurred in their absence. Flow control results in the delivery of all of the Counties' non-recyclable waste to two transfer facilities, which lowers the cost of subsequent long-distance transportation, and thereby makes interstate shipment of waste an *attractive* option. There is no reason to believe that interstate shipments would be more attractive in the absence of the Local Laws.

The proposed landfill

66. If the Authority does build a public landfill, this will have the effect of reducing private commerce in general. There is

---

[58] The Authority has informed me that the composition of waste disposed of at the Authority's transfer stations has contributed to decisions to begin recycling numerous materials, including junk mail, pizza boxes, and cereal boxes. *See* 'Oneida-Herkimer Solid Waste Authority System Improvement Schedule,' Oneida-Herkimer Solid Waste Management Authority, April 2001.; 'Items Recycled by Oneida-Herkimer Solid Waste Authority and Which May Not Be Recycled By Other Counties,' Oneida-Herkimer Solid Waste Management Authority, 2002.

nothing in the nature of such a reduction in private commerce that would disproportionately burden interstate commerce relative to in-state commerce. Under current conditions, it is likely that the impact of such a reduction in private commerce will fall most heavily on in-state interests. Less than one percent of the waste exported from New York State in 2000 originated in upstate New York. Also, the Counties' waste is currently being shipped to an in-state facility, indicating that in-state facilities would likely be used by private haulers were flow control removed.

Implication of widespread adoption of flow control and extraterritorial economic effects

67. The widespread adoption of flow control, as it is currently implemented by the Authority, would almost certainly increase interstate commerce. This is because, in some cases, municipal transfer facilities would be built in regions where private firms would not have adequate incentives to build such facilities, thereby lowering the cost of interstate shipments. Even if the widespread adoption of flow control were to be accompanied by significant increases in public landfills, demand for disposal in the private waste disposal marketplace would decline, affecting in-state and interstate private commerce alike. Given that just ten percent of municipal solid waste in the United States enters interstate trade, the absolute impact on in-state commerce would be far greater than that on interstate commerce. Finally, there is no evidence to suggest that the flow control laws, limited in application to waste generated within the jurisdiction adopting them, place *any extraterritorial* burden on interstate commerce. In fact, were flow control to be widely adopted and involve the construction of numerous public landfills, the resulting reduction in demand for disposal in the private marketplace would reduce the cost of disposal both for those municipalities that adopt flow control but continue to rely on that private-sector marketplace, as well as for private interests in jurisdictions that do not adopt flow control.

Public benefits

68. The citizens of Oneida and Herkimer Counties have enjoyed the benefits of safe and reliable solid waste management since the adoption of the Local Laws. The integrated waste management system established by the Authority has handled all waste delivered to it since it was established, and has instituted and maintained successful recycling, composting, and household hazardous waste programs, all of which benefit the public and are consistent with state waste management policy. The system has been enhanced and supported by a system charge on non-recyclable waste which equitably distributes the cost of the system on the basis of disposal of non-recyclable waste.

69. An economic assessment indicates that the objectives sought by the Counties' waste management plan are indeed legitimate public benefits. In particular, many of the objectives involve promoting actions that yield public benefits in excess of the benefits directly enjoyed by those undertaking the actions. Therefore, in the absence of government intervention, those actions are unlikely to be undertaken to the degree that is optimal from a societal perspective. While it is difficult to measure definitively the degree to which the Counties' waste management plan — and flow control in particular — is responsible for the achievement of these objectives, available evidence indicates that the Counties' have been successful in achieving their social objectives, and that flow control has played an important role.

Alternatives to flow control

70. Through a number of mechanisms, flow control has a unique capacity to enhance the achievement of public benefits. Flow control makes it possible to ensure that the disposal of all the Counties' non-recyclable waste is conducted in accordance with the Counties' desired levels of human health and environmental protection, which may

exceed that specified by state and federal regulations. By making greater price incentives possible and substantially reducing the cost of enforcement, flow control promotes increased recycling and waste reduction. Flow control also enhances the quality of information available to the Authority as it seeks to achieve the Counties' objectives related to solid waste management. Finally, flow control offers the only available means of achieving equity, as defined by the Counties, in financing the Counties' solid waste management responsibilities. I cannot conceive of any feasible alternatives that would offer the same level of public benefits.

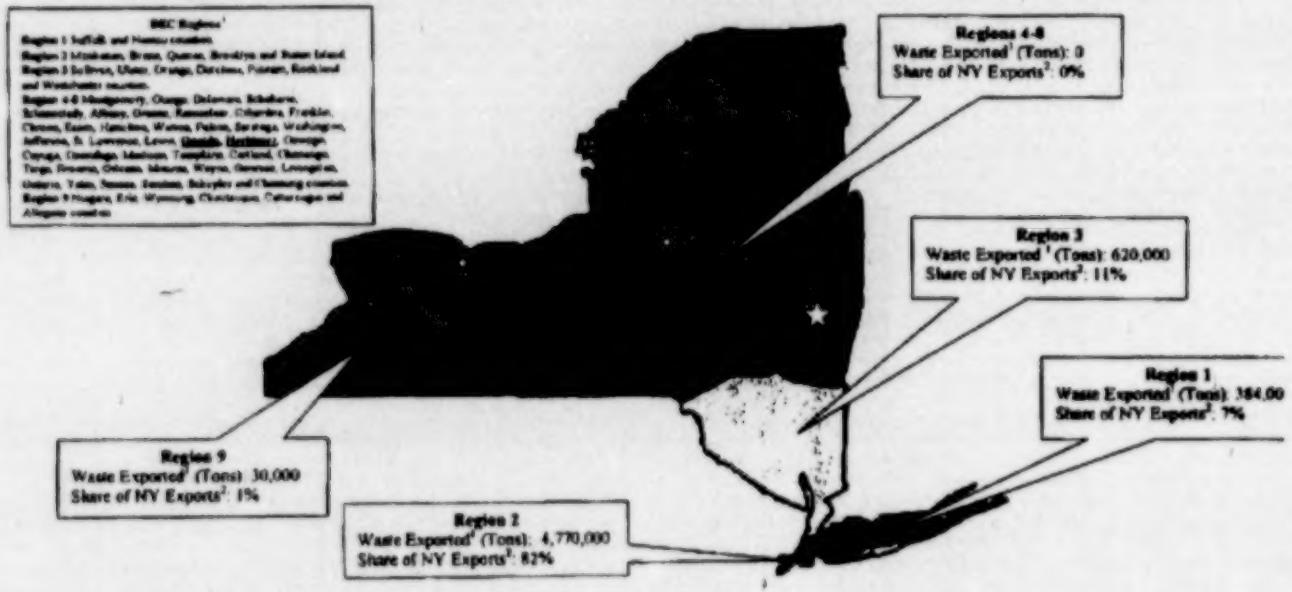
The foregoing constitutes my opinion with respect to the questions presented to me in this matter.

January 10, 2003

/s/ Robert N. Stavins
Robert N. Stavins

EXHIBIT 1

Waste Exported from New York State, By Department of Environmental Conservation (DEC) Region[1]



Notes
1 Waste Exported: Waste generated in the region that was shipped out of state in 2000.[a]
2 Share of NY Exports (in %): Waste exported in the region as a percent of total waste exported from New York State in 2000.[b]

Sources
a "DEC Regional Offices," New York State Department of Environmental Conservation, <http://www.dec.state.ny.us/website/about/ebmail3.html>, visited January 3, 2003.
b "Where Will the Garbage Go? 2001," New York State Legislative Commission on Solid Waste Management, April 2002, <http://assembly.state.ny.us/comm/SolidWaste/20020513/#Tables>, visited December 22, 2002.

[APPENDIX A – CV OF ROBERT STAVINS
OMITTED IN PRINTING]

APPENDIX B
MATERIALS REVIEWED

Affidavit in Opposition, Robert Julian, July 5, 1995.

Examination Before Trial of Marcella Guerriero, Plaintiff, Taken By The Defendants, Pursuant To Notice, United States District Court Northern District of New York, December 17, 2002.

Examination Before Trial of Thomas Ingersoll, Plaintiff, Taken By The Defendants, Pursuant To Notice, United States District Court Northern District of New York, December 16, 2002.

Examination Before Trial of David Levitt, Plaintiff, Taken By The Defendants, Pursuant To Notice, United States District Court Northern District of New York, December 13, 2002.

Examination Before Trial of Kenneth Wittman and Joan Wittman, Plaintiffs, Taken By The Defendants, Pursuant To Notice, United States District Court Northern District of New York, December 10, 2002.

Expert Report of Mark Berkman, November 15, 2002.

Hearing of Oneida-Herkimer Solid Waste Management Authority Board Regarding Violations of the Local Solid Waste Management Laws by Waste Systems International and Waste Stream, September 27, 1999. pages 10-23.

Response to Plantiffs' Interrogatories, United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Authority, CV-95-0516, United States District Court Northern District of New York, August 30, 2002.

B.F. Goodrich v. Murtha Trucking Inc., 958 F.2d 1192,United States Court of Appeals for the Second District, decided March 12, 1992.

National Electrical Manufacturers Association v. Sorrell, 272 F.3d 104, United States Court of Appeals for the Second Circuit, decided November 6, 2000.

Pacific Northwest Venison Producers v. Smitch, 20 F.3d 1008, United States Court of Appeals for the Ninth Circuit, filed April 4, 1994.

Pike v. Bruce Church Inc., 397, U.S. 137; Ct. 844, 25, Supreme Court of the United States, decided March 2, 1970.

United Haulers Association v. Oneida-Herkimer Solid Waste Management, Docket No. 00-7593, 00-7595, 00-7597, United States Court of Appeals for the Second Circuit, decided July 27, 2001.

Aquino, J., 'Down to Earth Look at Landfills,' Waste Age, June 1, 2000.

Barlaz, M., Gabr, M., and Mohammed, P., 'Final Report: Closing the Gaps in the Regulation of Municipal Solid Waste Landfills: Defining the End of the Post-Closure Monitoring Period and the Future Stability of Leachate Recirculation Landfills,' Environmental Protection Agency, <http://cfpub.epa.govincer_abstracts/index.cfm/fuseaction/display.abstractDetail/abstract/985/report/F>, visited December 31, 2002.

Chapman, C., 'Northeast Tipping Fees,' Federation of the New York Solid Waste Associations Spring 2001 Conference, New York, May 6-9, 2001.

Duff, S., 'Interstate Waste Keeps Crossing the Lines,' Waste News, August 6, 2001. as cited in: Porter, R., The Economics of Waste, Resources for the Future, Washington D.C. 2002. page 103.

Finneraty, B., 'Mandatory Recycling law Triggers Massive War on Waste,' Daily Sentinel, Rome N.Y., Tuesday Evening, August 9, 1988. page 2.

Goldstein, N., and Madtes, C., 'The State of Garbage,' Biocycle, December 2001. pages 42-54.

Kinnaman, T., 'Explaining the Growth in Municipal Recycling Programs,' Public Works Management and Policy, Vol. 5, No. 1, July 2000. pages 37-51. reprinted in Kinnaman, T., and Fullerton, D. The Economics of Household Garbage and Recycling Behavior, Edward Elgar, Northampton, MA. 2002. pages 153-167.

Kinnaman, T., and Fullerton, D., 'The Economics of Residential Solid Waste Management,' National Bureau of Economic Research ,Working Paper, August 1999.

Kinnaman, T., and Fullerton, D., 'The Efficiency of Solid Waste Recycling: A Cost Benefit Analysis,' Working Paper, Bucknell University, 1996. as citied in: Porter, R., The Economics of Waste, Resources for the Future, Washington D.C. 2002. page 138.

Ley, E., Macauley, M., and Salant, S., 'Restricting the Trash Trade,' American Economic Review, Vol. 90, Issue 2, 2000. pages 243-246.

Ley, E., Macauley, M., and Salant, S., 'Spatially and Intertemporally Efficient Waste Management: The Costs of Interstate Trade Restrictions,' Journal of Environmental Economics and Management, Vol. 43, Issue 2, 2002. pages 188-218.

Magnuson, A., 'What Now at the MRF,' MSW Management, September/October 1997. pages 32-41. McAdams, C., 'Moving Recyclables in New York State,' Waste Age, July 1996. pages 111-118.

Palmer, K., Sigman, H., and Walls, M., 'The Cost of Reducing Municipal Solid Waste,' Resources for the Future, Washington D.C., September 1996.

Pataki, G., '2001 Governor's Waste Reduction and Recycling Program Achievement of Excellence Award,' The State of New York Governors Office, October 22, 2001.

Patrick, M., 'Oneida Co. Oks Recycling Law,' Observer Dispatch, Utica N.Y., Thursday, July 28, 1988. pages 1A and 8A.

Porter, R., The Economics of Waste, Resources for the Future, Washington D.C. 2002. Repa, E., 'Solid Waste Disposal Trends,' Waste Age, April 1, 2000.

Repa, E., 'The Tip Off,' Waste Age, May 1, 2001.

Solid Waste Digest, Chartwell Information, Vol. 12, Number 5, May 6, 2002. pages 1-32.

'Landfill Development and Operating Costs,' Solid Waste Digest, Chartwell Information.

Stiglitz, J., The Economics of the Public Sector, W.W. Norton and Company, New York, 2000. pages 214 217.

'1996 Award of Excellence - Gold, in the category of Newspaper/Campaign goes to the Paige/Smith Group for OHSWA Ad Campaign,' Natural Resources Defense Council, 1996.

'2001 Pay-As-You-Throw (PAYT) Programs,' Oneida-Herkimer Solid Waste Management Authority, 2002.

'Are We Throwing it all Away? A Call for New York to Recommit to Recycling,' Office of New York Attorney General Eliot Spitzer, May 1, 2000, <http://www.oag.state.ny.us/press/reports/recycling/recycling.html>, visited January 5, 2002.

'Authority Waste Inspection Protocols,' Oneida-Herkimer Solid Waste Management Authority, 2002.

'Chapter 4: Allocating Costs,' Environmental Protection Agency <http://www.epa.gov/epaoswer/nonhw/muncpl/fullcost/docs/chap4.pdf>, visited November 12, 2002.

'DEC Regional Offices,' New York State Department of Environmental Conservation, <http://www.dec.state.ny.us/website/about/abtru113.html>, visited January 3, 2003.

'Disposition of Waste by Counties Neighboring Oneida-Herkimer Counties,' Oneida-Herkimer Solid Waste Management Authority, 2002.

'Draft Report, System & Future Alterations,' Oneida-Herkimer Solid Waste Management Authority, May 3, 1996.

'Final Local Solid Waste Management Plan,' Oneida-Herkimer Solid Waste Management Authority, September 1992.

'Flow Controls and Municipal Solid Waste,' Environmental. Protection Agency Report to Congress, The Office of Solid Waste, Municipal and Industrial Solid Waste Division, March 1995.

'Hazardous Waste Collection, Yearly Totals,' Oneida-Herkimer Solid Waste Management Authority, 2002. 'Industrial Waste Screening, CESQG Acceptance Program,' Oneida-Herkimer Solid Waste Authority, 2002.

'Interstate Shipping of Municipal Solid Waste: 1998 Update,' CRS Report for Congress, <http://www.ncseonline.org/NLE/CRSreports/Waste/waste-7a.cfm>, visited December 9, 2002.

'Items Recycled by Oneida-Herkimer Solid Waste Authority and Which May Not Be Recycled By Other Counties,' Oneida-Herkimer Solid Waste Management Authority, 2002.

'The New York State Recycling Bulletin 1999 Edition,' New York State Department of Environmental Conservation,

<http://www.dec.state.ny.us/website/dshm/redrecy/bulletin 99.pdf>, visited December 31, 2002.

'Non-Compliance Management Guidelines,' Oneida-Herkimer Solid Waste Management Authority, 2002.

'Oneida-Herkimer Solid Waste Authority Facilities Time Line,' Oneida-Herkimer Solid Waste Management Authority, 2002.

'Oneida-Herkimer Solid Waste Authority Facility Rules and Regulations for 2002,' Oneida-Herkimer Solid Waste Management Authority, 2002.

'Oneida-Herkimer Solid Waste Authority System Improvement Schedule,' Oneida-Herkimer Solid Waste Management Authority, April 2001.

'Oneida-Herkimer Solid Waste Authority, 2001 Annual Report,' Oneida-Herkimer Solid Waste Management Authority, 2001.

'Oneida-Herkimer Solid Waste Management Authority Solid Waste and Recycling Penalty Form,' Oneida-Herkimer Solid Waste Management Authority, 2002.

'Penalties Charged on Loads of Solid Waste Containing Recyclables,' Oneida-Herkimer Solid Waste Management Authority, 2002.

'Recycling Markets 1988-2002,' Oneida-Herkimer Solid Waste Management Authority, 2002.

'Recycling,' Environmental Protection Agency, <http://www.epa.gov/epaoswer/nonhw/muncpl/recycle.htm>, visited December 18, 2002.

'Request for Proposals, Solid Waste Disposal Services for Oneida-Herkimer Solid Waste Management Authority,' Oneida-Herkimer Solid Waste Management Authority, May 1990.

'Request for Proposals, Solid Waste Processing, Transporting, and Disposal Service,' Oneida-Herkimer Solid Waste Management Authority, December 17, 1997.

'Reuse and Recycling,' New York State Department of Environmental Conservation, <http://www.dec.state.ny.-us/website/dshm/redrecy/reuse2.htm>, visited January 2, 2002.

'Solid Waste Practices and Citizen Attitudes Regarding. Recycling in Oneida–Herkimer Counties,' William F. Cosulich Associates, P.C. & John Zobgy Associates Inc, New York, April 1988.

'Solid Waste Transporting and Disposal Agreement between Waste Management of New York State, L.L.C. and Oneida-Herkimer Solid Waste Management Authority,' November 30, 1998.

'Solid Waste: (RCRA Subtitle D),' Environmental Protection Agency, <http://www.epa.gov/region02/waste/dsummary.htm>, visited November 12, 2002.

'Total Non-Recyclable Waste Processed by Authority,' Oneida-Herkimer Solid Waste Management Authority, 2001.

'Various Configurations Used for Solid Waste Management Services in NYS,' Oneida-Herkimer Solid Waste Management Authority, 2002.

'Violations of Part 360 of 6 NYCRR for the period 1/1/99 – 1/2/03,' New York State Department of Environmental Conservation, Enforcement tracking system, 2003.

'Waste Transfer Stations: A Manual for Decision-Making,' Environmental Protection Agency, 2002, <http://www.epa.gov/epaoswer/non-hw/muncpl/pubs/r02002.pdf>, visited January 4, 2003.

'Where Will the Garbage Go? 2001,' New York State Legislative Commission on Solid Waste Management,

April 2002. <http://assembly.state.ny.us/comm/Solid Waste/20020513/4Tables>, visited December 22, 2002.

Drabicki, J., 'Memorandum Re: Assumptions for Expert Report Regarding CERCLA Liability,' December 23, 2002.

Lilla, S. 'Memorandum Re: NYS DEC Reporting,' Western Finger Lakes Solid Waste Management Authority, January 6, 2003.

'Memorandum Re: Continuity of Waste Processing Services,' Oneida-Herkimer Solid Waste Management Authority, January 9, 2003.

'Memorandum Re: Disposal of Waste Before 1988,' Oneida-Herkimer Solid Waste Management Authority, January 7, 2003.

'Memorandum Re: Disposal Rates,' Oneida-Herkimer Solid Waste Management Authority, December 31, 2002.

'Memorandum Re: Draft Report on System Status & Future Alterations,' Oneida-Herkimer Solid Waste Management Authority, May 6, 1996.

'Memorandum Re: Environmental Review and Pennsylvania Solid Waste Management Regulations,' Oneida-Herkimer Solid Waste Management Authority, December 21, 2002.

'Memorandum Re: ETS Cost of Operations pre ton,' Oneida-Herkimer Solid Waste Management Authority, December 21, 2002.

'Memorandum Re: Status and Future Steps for Development of Proposed Regional Landfill,' Oneida-Herkimer Solid Waste Management Authority, December 31, 2002.

'Memorandum Re: Transfer Stations Operation,' Oneida-Herkimer Solid Waste Management Authority, December 23, 2002.

'Memorandum re: Utica Metal Products' Waste Management Practices,' Utica Metal Products, January 8, 2003.

'Memorandum Re: Waste Tracking and Audits, Industries Recycling, Direct Billing Industrial/Commercial Generators, 2001,' Oneida-Herkimer Solid Waste Management Authority, December 23, 2002.

'Municipal Solid Waste (MSW): Basic Facts,' Environmental Protection Agency, <http://vvww.epa.gov /epaoswer/non-hw/muncpl/facts.htm>, visited November 12, 2002.

'Municipalities that Provide Municipal Collection of Solid Waste on a Weekly Basis,' Oneida-Herkimer Solid Waste Management Authority, 2002.

Local Law No. 1 – 1990, County of Herkimer.

Proceedings of the Board of Legislators of the County of Oneida, 1989.

Title 42, Chapter 82, Subchapter III, Sec. 6929. 'Ret ntion of State Authority,' U.S Code Online via GPO Access, <http://frwebgate.access.gpo.govicgibinigetdoc.cgi?dbna me=browse_usc&docid=Cite:+42USC6929>, visited January 4, 2003.

US Census Bureau, 'New York State County, Population, Housing Units, Area and Density,' <http:// factfinder.census.gov/servlet/GCTTable?ds_name=DEC_ 2000_SF1_U&geo_id=04000US36 &_box_head_nbr= GCT-PHI&format=ST-2>, visited December 31, 2002.

Chemung County Annual Recycling Report, New York State Department of Environmental Conservation, 1998.

Fulton County Annual Recycling Report, New York State Department of Environmental Conservation, 1998.

Oneida-Herkimer Counties Annual Recycling Report, New York State Department of Environmental Conservation, 1998.

Seneca Meadows Landfill, Annual Reports: 1999, 2000.

Western Finger Lakes Annual Recycling Report, New York State Department of Environmental Conservation, 1998.

APPENDIX C

A careful examination of the incentives that influence the decision to build a transfer station suggest that, because it faces different incentives, the Oneida-Herkimer Solid Waste Management Authority may have established transfer stations and begun interstate waste shipments before it was economically attractive for private haulers to do so. This would have the effect of lowering the cost of long-distance waste transportation — and thereby increasing likelihood of interstate commerce — earlier than would have been the case in the absence of the Local Laws. Even if the specific circumstances in Oneida and Herkimer Counties imply that private haulers would have built transfer stations as early as the Authority did despite the Authority having greater incentives to do so, the greater incentives facing public authorities may accelerate the construction of transfer stations in other communities adopting the Counties' waste management approach. Therefore, the discussion below has relevance in evaluating what would happen if the Counties' waste management approach were adopted widely.

In the absence of flow control, a private haulers' decision to build a transfer station would depend on whether such an action would minimize the combined cost of transporting and disposing of its waste.[1] Prior to building a transfer station, a hauler faces transportation costs that increase by a particular amount with each additional mile traveled to a disposal site (Line C_{NTS} in Figure 1 of this, Appendix). A transfer station offers lower per-mile costs of shipping waste, that is, the slope of Line C_{TS} is less than the slope of Line C_{NTS}. Yet, regardless of how far waste is shipped, transfer stations involve significant capital expenditures and fixed costs

[1] While transfer stations could be built by firms other than those that collected waste, the same conditions would have to be met for such an operation to provide services profitably to local collectors.

necessary for their construction and operation (Amount FC in Figure 1, hereafter referred to as "fixed costs").[2]

As shown in Figure 1, if a hauler is going to ship waste sufficiently long distances, it may be less costly to build and use a transfer station, even after taking into account the cost of building and operating it. That is, beyond distance M*, Line C_{TS} is lower than Line C_{NTS}. Beyond that distance, the per-mile savings offered by a transfer station will allow the hauler to fully recoup the fixed costs of the station. In like manner, for distances less than M*, the total transportation costs are lower if the hauler does not build the transfer station. Up to M*, the distance is not sufficient for the per-mile savings offered by a transfer station to offset its fixed costs.

When faced with the opportunity to dispose of waste locally, a hauler would only ship waste to a distant site if that landfill offered savings in disposal fees, relative to the local site, that would be large enough to offset the total increase in transportation costs (Amount A_{PH} in Figure 1). It is essential to note that, because the hauler must be convinced of the merits of building and operating a transfer station — something s/he would not do if a local landfill were used — the amount of savings necessary to bring about long-distance waste shipment is affected by his/her need to recoup the cost of building and operating the transfer station (Amount FC in Figure 1). In particular, the savings in disposal fees must be sufficient to more than offset the additional transportation costs if the hauler already had a transfer station in place (Amount A_{PH} in Figure 1). The savings in disposal fees must also be sufficient to offset those fixed costs of the

---

[2] The cost of having a collection truck deliver its waste to the transfer station at the end of its collection route, instead of beginning to drive towards the ultimate disposal site, can also be considered a part of the fixed costs of using a transfer station. This is a cost in that it involves time — and associated labor, fuel, and equipment costs — that could have been spent driving towards the ultimate disposal site.

transfer station that could not be recouped if the hauler disposed of waste locally (Amount A_{PH2} in Figure 1).[3] Only then would the hauler build a transfer station and ship waste to the distant site.

In contrast, with benefits from building a transfer station beyond that of minimizing the combined cost of transporting and disposing of non-recyclable waste, the Authority built transfer stations at a point in time when it might not have been profitable for local haulers to do so. Once the stations were built, in order to make disposal at distant sites attractive, the disposal fees at those sites only needed to offer savings relative to fees at local sites that were great enough to justify the additional transportation costs (Amount A_A in Figure 2). This amount is equivalent to A_{PH1} in Figure 1. Unlike in the case of a private hauler, since the fixed costs (Amount FC in Figure 1) would be incurred regardless of where the waste is shipped, those costs would not affect the amount of savings necessary to encourage the Authority to choose a distant disposal site. Consequently, once the Authority's transfer stations were in place, interstate shipments became attractive with a smaller difference in disposal fees between in-state and out-of-state sites than would have been necessary to make it profitable for private haulers to build transfer stations and engage in long-distance waste shipments. That is, amount A_A is less than amount A_{PH}.[4] Thus, there is an economic basis to believe that the

---

[3] It is this portion of the fixed costs that would cause a hauler to decide against building a transfer station if s/he were delivering waste locally.

[4] Another factor that suggests the Authority may have established transfer stations earlier than the private sector would have is the fact that the decision to build a transfer station involves a significant, irreversible investment with an uncertain return. Even if, at the point in time that a transfer station could be built, distant landfills offer disposal fees that are low enough relative to local sites to suggest that a hauler could recoup the cost of building the transfer station, there would still be significant risks that a hauler would not be able to recoup all of those costs. Among other contributors to this risk are: the possibility that a low-cost local disposal

Local Laws, and the Authority's implementation of them, may have brought about interstate shipments of the Counties' waste sooner than would have occurred in the absence of those laws.

---

option would become available in the future, and the potential that competition may keep the hauler from maintaining enough customers — and hence trash flow — to recoup the cost of building and operating the transfer station. This risk would reduce the hauler's incentive to build a transfer station.

Figure 1. Cost of transporting one ton of waste with and without a transfer station as a function of distance: Assuming transfer station's construction and use is dependent on disposal site chosen[1]

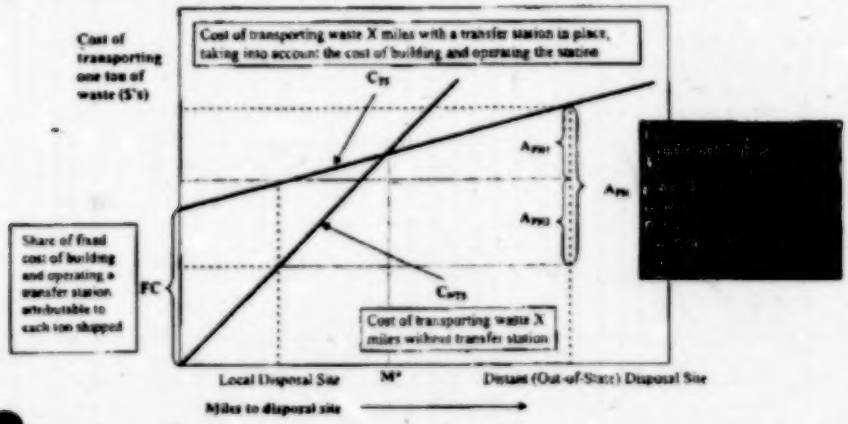
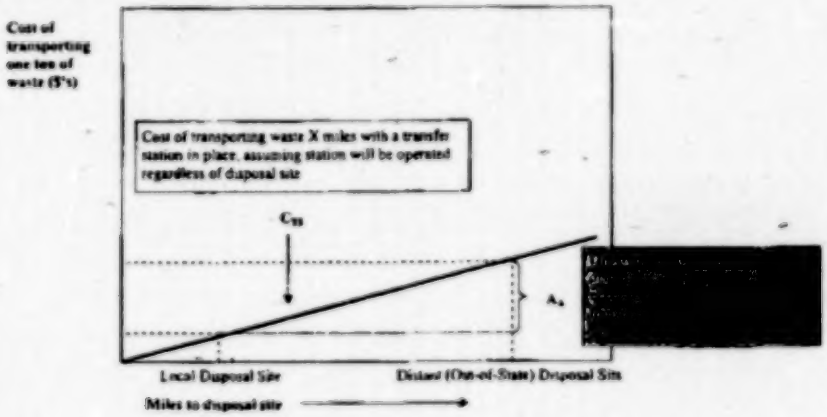


Figure 2. Cost of transporting one ton of waste as a function of distance: Assuming transfer station will be built and used regardless of distance that waste is shipped



[1] 'Waste Transfer Stations: A Manual for Decision-Making,' Environmental Protection Agency, 2002. <http://www.epa.gov/epaoswer/non-hw/muncpl/pubs/r02052.pdf>, visited January 4, 2003.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

Affidavit In Opposition to
Plaintiffs Motion for Summary Judgment

HANS G. ARNOLD, being duly sworn, deposes and says:

1. I am the Executive Director of the Oneida-Herkimer Solid Waste Management Authority (the Authority) and have held this position since the creation of the Authority in 1988. Before that I was Commissioner of the Oneida County Department of Solid Waste Management. Prior to that time, I worked on environmental management, planning, and solid waste issues in the Oneida County Planning Department. I am the immediate past president of and I remain an active member in the New York State Association For Solid Waste Management. I was appointed by the Governor to serve on the New York State Solid Waste Management Board. I make this affidavit in opposition to the plaintiffs motion for summary judgement.

2. The plaintiffs here seek to eliminate the ability of a community to make a public decision to establish a system that best serves their solid waste management needs and goals. They ask this Court to destroy that local option and replace it with a system that gives the hauler the exclusive right, without consultation with the waste generator or any community representative, to decide what, how, and where that generator's solid waste will be managed. They seek to strike down the ability of the public to exercise the right to establish a solid waste system that excludes, evenhandedly, private sector disposal services.

3. The local solid waste management laws were not used to "fund", "reimburse", or "finance". These local laws were enacted in response to public demand and to meet the public goals of the residents, industries and businesses of the two Counties. They represent a community's solution to a difficult problem; a solution based on clearly developed public policy goals; a solution employing a fair, organized and logical approach; and a solution put in place democratically through action by duly elected local elected officials.

Inherent Problems in Solid Waste

4. Solid waste is not an innocuous or inconvenient item. It is an obnoxious amalgam of discarded items, products and materials that singly and in combination will result in contamination of air, land and water and threaten public health if not properly managed. Residential and municipal waste streams contain materials like diapers, old paint, pesticides and chemicals, used motor oil, light bulbs, batteries, plastics, construction and demolition debris and other discarded products that may contain mercury, lead and other heavy metals. In the past, the improper management of these items either at unlined landfills or through roadside dumping or backyard burning, has resulted in severe environmental and public health problems.

5. In Oneida and Herkimer Counties, there is a long history of both private sector mismanagement of solid waste service and community efforts to rectify the situation. The Court is respectfully referred to the affidavits of Robert Julian and Michael Gapin for that history.

6. Today, the residents, businesses and industries of the region generate about 615 tons of solid waste every day of the year. There have been and continue to be three basic worries relative to solid waste management. First, the careless handling of solid waste results is an immediate threat to public health because of exposure to disease and vectors

for disease. Without proper collection, handling, processing and disposal, a public health crisis can arise and it is the public's representative, government, which must react and control the problem. The threat to public health can occur at every step in the process of handling solid waste, but importantly, it can and does occur right at the place it is generated, the home, if there is not a regular and reliable means for collection.

7. The second worry is the latent environmental and public health threat. Only in the past 25 years have we realized that improper management of solid waste will pollute groundwater and surface waters. The cost of cleaning groundwater contaminated by solid waste in the Oneida-Herkimer region alone is estimated at over $74 million.

8. The third concern is the mismanagement of finite natural resources. We have become a society producing an ever increasing volume of waste creating a regular and increasing demand for new disposal areas. Only an organized system of waste reduction and recycling can change that trend, promote wise use and conservation of resources, lessen our dependence on disposal, and slow our societal need for ever expanding disposal sites. The private market alone, and one element of the private sector (waste haulers), have not and will not provide such a system.

Public Response

9. The U.S. Congress and New York State Legislature addressed these issues with sweeping legislation to change the way we manage solid waste. (See Gapin Affidavit for a history of these policy initiatives.)

10. The public's recognition of solid waste problems continued and grew in the 1980's. The public was outraged when medical waste washed up on the shores of Long Island and New Jersey. Public cynicism soared when the now famous "garbage barge" MOBRO, relying purely on private

waste transporters, was turned away by disposal facilities along the entire east coast and the Gulf of Mexico.

11. Here in Oneida and Herkimer Counties local governments were jolted into the reality of state and federal laws that closed their old landfills and forced expensive clean-ups. Citizens were sent the bill to clean up a problem they thought they had left at their curb years ago. They never expected it to return.

12. The most publicized example of a local landfill engendering extended liability to broad sections of the public involved the Ludlow Landfill, which was placed on the National Priority List due to PCB and other contamination of groundwater and an adjacent wetland. The owner of the landfill and the generator of the waste oil containing PCB's brought a legal action against over 600 third parties forcing them to pay for the clean-up of the landfill and adjacent groundwater. School districts, dress shops, restaurants, villages, waste haulers, and many others were sued under CERCLA for the remediation costs even though the waste they sent to Ludlow was household-type garbage, and not oils containing PCB's. (See affidavit of Robert Julian for additional detail).

Local Government Response

13. Although there was a recognition of the need to reduce and recycle more waste as early as 1970, the expense of a separation program and the intrinsically cyclical nature of markets for recyclables were barriers to any meaningful levels of recycling. In the mid 1980's, local towns and villages were unwilling to make the capital investment in recycling in the face of widely fluctuating markets for recyclables. The local governments looked for a regional approach to recycling. Private collection and disposal practices at that time yielded no benefit for waste reduction and recycling. The more waste that was generated, the greater the revenue for disposal at the private landfill.

14. Based on a clear and continuing message from the general public, environmental groups and many others in our area, the Oneida and Herkimer County Legislatures took action to establish a public solid waste management system that would make recycling and waste reduction the top priority. Early in 1988 a local solid waste management and recycling law was advanced for public comment. The laws (see Julian affidavit) made the strongest possible statements of public policy:

- Protect the environment
- Reduce the waste stream
- Recycle everything feasible
- Stop illegal disposal
- Manage waste by its components through an exclusive public integrated system.

Creation of the Authority

15. The Counties created the foundation of the solid waste management system for the region, based on extensive public input, with the approval of the local solid waste management laws in 1988. The public through their duly elected representatives, had decided that it was fair and necessary that there should be a public system for the processing and disposal of solid waste generated by the area's residents, businesses and industries. It was clear to the public and to their elected representatives, that this function could not be left exclusively to the private sector. The horror story of exclusively private control had been played out here in the 1960's, 1970's and 1980's and the region had suffered environmentally and financially because of it (see Julian affidavit).

16. After considering many alternatives for moving forward with the public system, the Counties elected to ask the state to authorize the creation of a public benefit

corporation. Upon its creation in 1988 the Authority was empowered and designated to be the exclusive entity to plan and develop a public solid waste management system and to implement a public waste disposal monopoly over unrecycled and recyclable solid waste.

Development of An Integrated System

17. The Authority was created as the public administrative entity to develop and implement the policies of the counties. It is engaged in no activities other than those directly relevant to the fulfillment of its purposes.

18. The Authority developed a Local Solid Waste Management Plan in 1991, consistant with the series of New York State Solid Waste Management Plans, that established how we would proceed to accomplish the public policies adopted by the Counties. The approved plan describes the framework we established and continue to follow:

> The overall goal of the Oneida-Herkimer Solid Waste Management Authority is to provide for maximum levels of waste reduction and recycling, coupled with the development of environmentally and economically sound programs and facilities for the remainder of the waste stream. It is the intention of the Authority to continue to increase reduction and recycling programs and to plan all facilities to reflect these maximum feasible recovery levels.
>
> (FLSWMP, 5/91, p. 4)
> (See Exhibit A-1)

19. The Authority charted a course consistent with the broad base of public input received over many years and with public policies as adopted by the County Legislatures in the local solid waste management laws.

20. The approach, legislatively determined by the Counties, is one that could not be done without public assumption of the responsibility to provide waste disposal

service. But, at the same time, the Authority has sought to meet the public policy goals by combining and integrating the private and public sectors within the system.

Waste Reduction & Recycling

21. I had been completely involved, first as an environmental planner and then as the Commissioner of the Oneida County Solid Waste Department, with the very public process leading up to the creation of the Authority. I hold a keen understanding of what the public said throughout the process, which spanned most of the 1980's. If reduced to one word it would have been – RECYCLE!!

22. When the Authority was formed we began some pilot recycling and set up rudimentary programs to collect newspaper and glass. At every public forum I attended and in all the calls to our office, the public's message was clear – RECYCLE MORE!!

23. Oneida County had funded and started the construction of a regional materials recovery facility, now identified as the Oneida-Herkimer Recycling Center. The Authority agreed to take over the construction of the facility and to purchase it.

24. The design of the Recycling Center and the development of the recycling program were carefully integrated, at all times making sure that the recycling system would fully meet the Counties' public policies as set forth by the legislatures.

25. The Authority set out basic parameters for the recycling system:

- Make the separation program for residents user friendly – easy to understand and convenient.
- Establish as many recycling opportunities as possible. Recycle not only the easy, high revenue

items but also the lower value items that might initially be more expensive to process.

- Expand recycling opportunities whenever markets permit, even if it is a marginal market.
- Provide ample public education and information through schools, civic clubs and traditional media.
- Create incentives, financial if possible, to promote recycling.
- Make the Recycling Center able to serve the community for the long-term and make it adaptable to new recycling opportunities.
- Produce high quality processed recyclables so that market, security can be enhanced.

26. Public information and education began well before the Recycling Center opened to alert the public to the new opportunities they had been looking forward to. Since 1989, approximately $1,094,900 has been spent by the Authority on public information and education.

27. The Recycling Center opened in February 1991 and was characterized locally as marking the beginning of a new era in environmental management in Central New York. Over 4,000 people attended the grand opening, and since then over 11,000 people (mostly school classes) have toured their public Recycling Center.

28. Since opening in 1991 new recycling opportunities have been added and now residents of Oneida and Herkimer Counties have the opportunity to recycle all of the following through the Authority system (See Exhibit A-2):

Newspapers & Inserts
Magazines & catalogues
Phone Books
Brown Grocery Bags & Kraft Paper
Junk Mail
Automobile Batteries
Used Motor Oil
Used Motor Oil Filters
Household Paint
Used Antifreeze

Corrugated Cardboard
Lightweight Cardboard (i.e. cereal boxes)
Computer Paper
Glass
Plastics
Beverage Cartons & Drink Boxes
Metal Cans
Aerosol Cans
Foil Wrap & Foil Plates
Yard & Garden Waste
Brush
Swimming Pool Liners

29. The Oneida-Herkimer system is regarded as one of the most aggressive and expansive recycling programs in the Country. In addition to all the households in the region, approximately 200 businesses and industries use the facility. Since opening, over 133,000 tons of material has been processed for delivery to mills which manufacture new products. The Authority has contracts with 38 local and interstate buyers for these materials.

30. Prior to the public Oneida-Herkimer system, none of this material was recycled by the private sector and no funds were expended to educate and change the waste disposal habits of the public prior to the opening of the Center in 1991.

31. The early and major involvement in recycling allowed the Authority to establish a strong business relationship with mills and other buyers. This was recently confirmed in a 6/30/95 letter from CANUSA, a major international paper recycling company. The quality of the material sent by the Authority has been commended by the mills and the regular supply by Oneida-Herkimer and other municipalities has been the basis for new investment by the mills. This in turn has contributed significantly to higher prices for recyclables, particularly paper products. One of the original objectives of recycling - increase the reliable supply to spur expanded use of recyclables - has already been recognized for some recyclables. (See Exhibit A-3.)

32. However, the increase in a reliable supply must be sustained, even where financial loss is required, not only to fortify the market, but to maintain waste reduction goals. The objective of waste reduction through recycling may often conflict with market conditions, requiring the Authority to take steps which the private sector would not and could not take.

33. If left solely to the private sector, only the most profitable items would be recycled. If the market dropped, private firms would discontinue recycling that item. In 1987 - 1989 when the early public recycling programs were being shaped and when a comprehensive, community-wide recycling system was being considered, the private sector was discouraging recycling and charging for newspaper (See Exhibit A-4). The Authority's planning mandate required the opposite response – to continue accepting material without charge. The Authority's objective was to build a larger market and maintain public confidence through a stable, continuous program that is not subject to the expected wide swings of private markets.

34. The public does not want to be jerked in and out of recycling at the whim of private recyclers. Only with public involvement can the public policy of a comprehensive, continuous, dependable, and long-range recycling program be accomplished. Recycling markets change significantly. (See Exhibit A-5). As the graph shows, the plaintiffs now seek to declare that they are in the recycling and disposal business at exactly the point in time, and only at this point in time, when recycling markets are soaring and disposal fees are low. Experience has proven, even with the plaintiffs in this case, that collection firms will extricate themselves from "recycling and disposal" as soon as recycling markets fall and disposal fees rise. There is and can be no long-term private commitment to recycling and waste reduction in the absence of profitability.

35. As a public enterprise, the Authority takes all recyclables not just the ones with a low processing cost and high sales value. The Authority processes as many items as markets can be secured to continue to reduce the region's dependence on landfill disposal. Some items, such as green glass, #6 plastics, and lightweight cardboard (boxboard) have a significantly higher net processing cost than do newspaper and cardboard, in today's market conditions. The intent of the Authority is to provide a convenient, clearly stated recycling program with the continuity to be sustained over the long run.

36. Each year since the start of the recycling program there have been significant increases in opportunities and in the amount of material recycled. This remarkable trend reflects the community's eagerness for this program. This community has embraced recycling and they still ask for more opportunities. (See Exhibit A-6).

37. If we were to calculate the avoided cost of the Oneida-Herkimer recycling system over the last four years, using a conservative avoided disposal cost of $56 per ton, (ie. the price which would have been paid if 133,000 tons of recycled material had been landfilled instead) the value would exceed $14,000,000. By adding that figure to the actual receipts for sale of processed recyclables to mills, the value would exceed $19,000,000. The value of our community recycling program is immense in monetary terms and the long-term benefits for the community are even greater.

38. This system has reduced the burden on disposal - but it wasn't being done by the private sector or the haulers before the County legislators made the commitment. Private recycling in 1990 was minimal.

39. The Authority did not limit its recycling program to traditional materials, and it has sought every opportunity on the public's behalf. Brush, grass clippings and leaves, all of

which were being landfilled, can now be recycled. The private sector made no effort to manage this material and get it out of landfills. In 1991 the Authority permitted and constructed a nine-acre engineered pad to receive and process mixed green waste. There is no requirement that generators deliver green waste to the Authority facility, but over 40,000 tons of material from about 220,000 residents has been received and processed since 1991. The material is ground and windrowed to produce a stable humus. By taking this proactive step the Authority created a local market and now topsoil and landscape companies are competitively bidding to buy the humus product from the Authority. This is another example of a step taken to carry out the public policies of the counties.

40. The Green Waste Compost program, however, requires subsidy. Nevertheless, markets are being created and the Authority is reducing dependence on landfills significantly. This program is subsidized with fees collected from disposal of non-recyclable solid waste. It is an example of waste reduction achievable only through an integrated approach to management of the larger waste stream. It is a by-product of exclusive public responsibility for waste disposal.

41. As Program Manager for the Oneida County Environmental Management Council, I organized Oneida County's first household hazardous waste collection in 1983. It was the second in the state and the third such program in the nation. At that first event we collected 18 drums, mainly of pesticides, at a cost of $1,600. When the Authority was formed we organized similar events in 1989 and 1990. These one-day programs drew 1,098 and 1,271 people, collected 420 and 557 drums, and cost $165,000 and $225,000 respectively.

42. The Authority responded to this strong public demand and constructed a permanent, permitted Household

Hazardous Waste Management Facility. Now, service is given to more households, about 3,500 a year, at a lower cost, about $150,000 annually. The facility provides a weekly opportunity during six months of the year for individuals to dispose of pesticides, herbicides, oils, paints, solvents, photographic supplies and other household chemicals in the most environmentally sound manner. Of the 11,000 gallons received in 1994, 3,000 gallons were recycled and the balance was specially packaged for transport and disposal at licensed hazardous waste facilities outside the region. The public overwhelmingly supports this program.

43. No fees are charged to residents for drop-off of hazardous products. The cost is absorbed by the system because the benefit inures to the community in the reduction of toxicity of their landfilled waste. No similar private sector program is possible, but the program is possible for the Authority under the integrated system.

44. The Authority supports and expands the recycling program through a public information and education program. A recycling curriculum was developed by the Authority in 1992 and given to every elementary teacher in the region. Instructional posters on recycling (multi-lingual) have been mailed to every household in 1991 when the Recycling Center opened and in 1992, 1994, and 1995 when new recycling opportunities for plastics, dry food boxes, junk mail, and gable top boxes were added. Green waste composting posters are regularly provided through area home and garden stores. A "Just Mow It" program was developed to reduce green waste generation. A regular newsletter is published and the Authority is assisting local industries in establishing a computer bulletin board for recycling and regulatory updates. In addition, traditional advertisements including television commercials, billboards and block ads in the local media provide instruction and reminders to area businesses. Over 270 waste "audits" have been done for local

industries, at their request, to improve reduction and recycling and help reduce their waste disposal expenses.

45. If left solely to the waste haulers, or private sector in general, none of these programs would be implemented. Unless there is a tangible, short-term economic benefit, these types of programs have not been and will not be done privately. The public requires a regular reliable and full-service system that does not shrink or stop because the profit margin is too small. This is what the Oneida-Herkimer system provides.

Long-Term Environmental Security

> The most significant policy developed by the Authority, based upon consideration of public comment and all available information, is that the volume of waste sent to a landfill should be as small as possible. There is a growing body of evidence which indicates that modern landfills store, rather than dispose of, waste. Therefore, each unit of waste placed in a landfill triggers a long (perpetual) process of facility maintenance, monitoring, and possibly remediation. This is reflected in the Part 360 Regulations which require a minimum 30 year post closure plan.
>
> FLSWMP, 5/91, p. 82
> (see Exhibit A-1)

46. As set forth in Julian affidavit, the issue of long-term environmental security is of critical importance to all waste generators including every household, business, industry, and institution in the Counties. It is therefore critical that extreme care be taken in all aspects of waste management to insure that waste is only sent to facilities with the best environmental protection systems and with proven management experience. If this level of care is not taken, the public could be exposed to the kind of massive financial

liability that happened with the Ludlow Landfill, but on a multiple site basis.

47. The Authority employs a system of monitoring, inspection and checking of all wastes delivered that helps to minimize this risk and give certainty and security to the public.

48. The plaintiffs' own submission in this case demonstrates that they will not follow even the most rudimentary rules of environmental safety.

49. Jeff Bliss, in his supporting affidavit, states that he uses "Bill Frank in Youngstown, Ohio, for disposal of C & D debris". According to Mary Helen Smith, Mahoning County Solid Waste Program, there is no Bill Frank, Inc. facility in Youngstown, Ohio. Bill Frank is a Pittsburgh waste broker arranging disposal deals at many landfills in Ohio. Some of the solid waste brokered by Bill Frank is disposed of at American Landfill in Mahoning County which is unlined. C & D material is sent to LAS Landfill which is also unlined. Based on Ms. Smith's records. Bliss Disposal is not registered in Ohio as a transporter.

50. Discovery in this case will reveal whether Bliss or any other plaintiff informs customers of the ultimate destination of their waste, or purports to assume any obligation to indemnify customers from liability arising from improper disposal by Bliss, subsequent brokers, or any other entity in the subsequent chain of handling and possession.

51. Public disposal by contrast both informs citizens of the destination of their waste and assumes collective responsibility for potential future liability. Avoidance of those risks is the focal point and avowed purpose of the public system.

52. The Authority has taken steps for the short and long-term to make sure that the public's exposure to environmental liability is controlled and minimized. For

waste material that cannot be recycled the Authority operates one local and two regional transfer stations. The local station serves the Town of Webb. The two regional, stations provide the means to receive, inspect, and aggregate the waste for transport to Empire Sanitary Landfill - the facility which is contracted by the Authority, under strict standards set forth in public bidding documents, to receive waste until the landfill is developed locally to serve this region. Waste is inspected to first insure that no dangerous or hazardous materials are received. If they are, actions are taken immediately for the safe and legal disposition. Secondly, the inspection is to insure compliance with recycling requirements.

53. The community and specifically all waste generators benefit from the use of a single publicly selected facility for disposal. The Empire facility employs the best environmental protection systems available. Waste generators have their long-term environmental risk minimized because of these protections and because the Authority made a commitment as the responsible party should there be any legal action in the future.

54. The Authority also operates its own landfill. This double composite lined, New York State Part 360 compliant facility will reach capacity in the next 6-8 months and will be closed. For at least 30 years the Authority will monitor and maintain the landfill.

55. As part of the development of the local solid waste management plan, the Authority worked with the community to develop a method for siting a landfill locally to serve the region. Over 40 public hearings were held on the methodology before it was employed to identify potential sites. The list of potential sites (78) was examined and scored with priority attention on the top 10. Three of these sites were identified for further consideration and two of these were subjected to subsurface investigation.

56. In 1994 one site was designated to apply for permits and an environmental impact statement. In 1995 the principal property needed for the landfill was secured by the Authority. The landfill is an important component of the system to insure that the environment is protected to contain and minimize the long-term environmental liability, and to provide reliable, cost effective service. However, its size, cost and life are dependent on the success of the reduction and recycling programs of the system.

57. The system is designed to maximize recycling, minimize disposal and insure the highest levels of environmental protection over the long term. The system is designed and intended for the long-term. Siting, constructing and operating a safe and modern landfill is a component of that system. The costs of construction and operation of the landfill do not drive the system. Rather, the system determines the need, size and costs of the landfill.

Financial Fairness & Security

58. The Authority has reflected the community's goals in the structure of its financial management system as well. The Authority established this as an official policy in the approved Local Solid Waste Management Plan:

> "The Authority will continue to employ a rate structure which rewards and promotes reduction and recycling. The Authority will also expand education and other efforts to improve participation in recycling and increase recovery rates."
>
> FLSWMP, 5/91, p.4
> (see Exhibit A-1)

59. The Authority's system tipping fee is a user fee system where every entity that delivers non-recyclable waste to the system is charged on a weight basis. The cost of providing the system of services, based upon the waste generated within the two Counties, is $86 per ton for

municipal solid waste (msw) for 1995. This fee supports all the facilities and programs which have been and are being put in place to meet the community's goals through an integrated service system. The fee is not charged on recyclables. That decision was made to encourage as much recycling as possible.

60. Under system fee financing, waste generators have a direct economic incentive to minimize the amount of waste they discard. Major industries like Remington Arms have cut down on their solid waste expenses by reducing and recycling more. Their former CEO came to the Authority Board and said he was prompted into action by the County laws.

61. Other financial management structures were considered and could have been used. Simply relying on County real property taxes was considered and in fact it has been advocated by one of the plaintiff's legal representatives. But, paying for solid waste through real property taxes is inherently and grossly unfair. There is no relationship between the volume of waste one generates and the value of one's property. For example, there are many large waste generators in the Counties which are tax exempt:

- New York State Mid-State Corrections Facility (1,600 inmate prison) - generates about 1,500 tons of waste annually but pays no property taxes.
- Mohawk Valley Community College - generates about 1,400 tons of waste annually, but pays no property taxes.

62. Under a property tax revenue system, farmers, homeowners, small business owners, and some industries would be saddled with a disproportionate share of the cost of solid waste. Under a property tax revenue system there would be no incentive to reduce or recycle since no measure of waste generation could be used to reduce taxes. While the

plaintiffs seek the "easy" subsidy of taxes to lower tipping fees on non-recyclable waste, the result would simply produce a windfall benefit to large waste generators at the expense of the average citizen.

63. The private sector waste disposal business has not and will not provide the kind of incentives provided by the Oneida-Herkimer system. The incentive for private hauler and landfill operator is to maximize waste to the disposal site and to do so as quickly as possible. Although none of the plaintiffs are in the disposal business, they seek to dismantle the system so that they can dispose of waste at the lowest price without regard to long-term environmental considerations and without offering the extra effort and cost of recycling, green waste composting, household hazardous management, oil recycling, and long-term education.

64. When the plaintiffs say that they can dispose of waste more cheaply, they want the Court to compare a single item disposal cost with the cost of an integrated system that includes reduction programs, education, recycling, composting, household hazardous waste, long-term landfill siting and other services the public demands. No reasonable comparison is possible between two such disparate levels of service.

The Role of Waste Collectors/Haulers

65. As detailed in the Julian affidavit, the public solid waste management system in Oneida and Herkimer Counties was developed to meet a variety of objectives including reduction, recycling, environmental security, and financial equity. The public policy commitment to the system made by the two County Legislatures was based on years of extensive interaction with the public and observation of the private sanitation industry. The public wanted the County to take a lead and develop a safe integrated system for the long-term security of the community.

66. The integrated system of programs and facilities, including the financial structure, is a comprehensive whole, greater than the sum of its parts. It is a stark contrast to the plaintiffs present and proposed business activity, should they prevail in this case.

67. The plaintiffs are in the business of waste collection. The plaintiffs are not in the disposal business. None claim to own a waste disposal site. None claim to own a recycling center or any type of processing facility. None claim to operate a landfill. None claim to have a financial interest in a landfill, recycling center, or waste processing facility. The plaintiffs drive trucks to collect waste, and in some cases they bring it to a garage to aggregate larger quantities, and they drive the waste to various processing and disposal locations. They have not negotiated long-term contracts with landfills, other disposal sites, waste processing sites, recycling centers or other waste management facilities. They have not made commitments on behalf of a region of 316,000 people.

68. The plaintiffs would like to portray that they are in the disposal business – because the current disposal market has low tip fees. They would arbitrage the spread between local Authority fees and the cheapest rates on the interstate market, thereby pocketing, for the short run, a sizeable profit. But when tip fees were higher and landfill capacity was more scarce, the haulers, including at least two of the plaintiffs, demanded county action to build a landfill. (See Julian Affidavit).

69. The standard billing practice of the waste collection industry in Oneida-Herkimer Counties and elsewhere is to treat disposal costs as a pass through to customers and generators. Customers are billed the cost of collection - fuel, wages, insurance etc., plus the anticipated cost of disposal. Where, as here, disposal services are public, disposal costs are uniform for generators and haulers alike. Competition

among haulers for customers is not affected by disposal costs, and firms gain or lose business by virtue of the efficiency of the collection service. Where disposal is procured on the open market, disposal costs become an element of competition in the collection industry. When this happens the power to choose the means, location and standards of disposal shifts from the customer (and his government) to the hauler.

70. All haulers who collect waste in Oneida and Herkimer Counties play on a fair and even playing field. The plaintiffs make no complaint that the public provision of disposal service injures their collection activities. They have lost no customers under public disposal.

71. The named plaintiffs applied for and received permits from the Authority for each year since the system was started. The plaintiffs have been seriously delinquent in payment of bills to the Authority over the seven years in which the system has been in effect. In December, 1994 these plaintiffs applied for and received permits and thereby agreed to participate within the system and comply with the applicable rules and requirements (See Exhibit A-7). One plaintiff wrote a letter on 1/5/95 thanking the Authority for a time extension and saying she was "looking forward to continuing a good business relationship" (See Exhibit A-8). Immediately thereafter, she took waste to Seneca Meadows in breach of a municipal collection contract to go to the Oneida-Herkimer facilities. Moreover, plaintiffs began a series of Freedom of Information requests for documents in connection with the lawsuit over seven (7) months ago.

72. The plaintiffs are not typical of the other haulers who do business within Oneida and Herkimer Counties. In letters from other haulers the support for the Authority system is apparent. In these letters the haulers point to fairness and to the need for a public system like ours to make sure that the small-scale hauler can compete and thrive. (See Exhibit A-9)

73. The lead plaintiff does not represent any other haulers or the views of any other haulers. Since the litigation the Authority has received unsolicited copies of letters from six (6) haulers who have resigned from the United Haulers Association because of the litigation. (See Exhibit A-10).

74. To the extent that any plaintiffs are currently taking unauthorized waste to other disposal sites in New York and elsewhere, they are bypassing the Oneida-Herkimer system and cheating all those who are still operating by the standing rules.

75. Some of the important material facts, known to the plaintiffs, bearing upon the differences between public and private sector waste disposal and the accuracy of their claims include whether any of the plaintiffs have taken waste out of the Oneida-Herkimer system; whether disposal of such waste was at a fee lower than that charged by the Authority; if any of the plaintiffs have notified customers before or after such waste was taken to a facility outside the Oneida-Herkimer system; whether such plaintiffs have given or offered any reduced price or credit to the generators reflecting lower disposal fee; whether plaintiffs have notified the generators of applicable laws, regulations and specifically the County solid waste management laws; whether plaintiffs have disposed of large volumes of recyclables in landfills; whether plaintiffs have taken waste to unlined landfills and other non-compliant facilities; whether plaintiffs have taken waste to landfills partially or wholly located on land listed on the New York State Registry of Inactive Hazardous Waste Sites; whether plaintiffs have violated waste service contracts with public organizations; whether plaintiffs are in violation of legally binding affirmations they made in permit applications and agreements with the Authority; whether plaintiffs are in violation of state permits in which the plaintiffs committed to the participation in the Authority system and to deliver waste to specific Authority facilities. That information will demonstrate for the court the actual pattern and practice of

the collection industry in the Counties, and allow the court to justly weigh the purposes and benefits of the public system against the injury alleged by the plaintiffs.

Summary of Direct Impacts

76. If the Authority's monopoly on disposal is removed, the present operative criteria for selection of disposal methods – environmental security and compatibility with the broader goals of waste reduction – will be replaced by cost alone. Because environmental security adds cost to disposal, the lowest disposal costs will correlate with the least secure facilities. Generators however will be unable to make environmental determinations in an open market, because disposal prices offered by collection firms will be the dominant variable in combined service prices.

77. The power to choose disposal method and safeguards will pass to the hauler as a consequence of the introduction of low-cost disposal as the overriding market variable in collection industry consumer contracts. That variable is not now present in the collection industry. Authority tipping fees are constant and uniform for all collection firms – and all generators - only because the Authority monopolizes disposal service.

78. On the other hand, the Counties, through the Authority, have made long-term commitments on behalf of 316,000 residents and thousands of businesses, industries, and institutions. The Authority owns, operates and is developing an integrated system of facilities and programs, on the public's behalf. Public disposal is the only means to provide individual and small-scale generators with a voice in setting environmental standards for the facility which will receive their waste.

79. If the plaintiffs were to succeed in dismantling the Oneida-Herkimer integrated public system through this litigation it would cause immediate hardship to the defendant

and to the public and it would return solid waste management to a mode of operation that existed 20 years ago.

80. No solid waste planning would occur in the region. Waste would go to the cheapest disposal location a hauler could find with little regard for environmental soundness. Waste generators would be exposed to liability similar to the Ludlow situation. Upon a reduction of landfill capacity, users would be subjected to purely market driven supply and demand forces and pay premium disposal fees as a result. Their customers would pay the price. (See also Gapin affidavit).

81. Recycling would be restricted to only those items for which the private sector received sufficient profit. Continuity would evaporate as recyclable items would vary from month to month depending on the market. Participation in recycling would decrease because homeowners would become discouraged with the complexity of multiple private systems and with an ever-changing list of eligible recyclables. More recyclables would be disposed of with MSW and waste reduction would cease. Consequently, it would be impossible to meet state mandated reduction and recycling goals.

82. There would be no incentive for the development of new recycling markets. As local history has shown, the establishment of steady supplies of high grade material through price fluctuation spawn market development. Private sector recycling is purely reactionary. It deals in commodities where strong markets already exist and structures its market development accordingly. Private companies won't recycle material in a marginal or negative market.

83. Recycling and solid waste education would be terminated for lack of definition. Solid waste and recycling audits provided to institutions, businesses, schools and industries would cease. The promotion of alternate waste disposal options, if more costly than the cheapest market alternative, would be ineffective.

84. Yard waste composting would diminish significantly as municipalities could not collect the material and process it independently. It would instead be disposed of with MSW.

85. Household hazardous waste collection would cease to exist because there would be no funds to support it. This waste would end up back with MSW, thereby increasing its toxicity. The small quantity generator program would also cease to exist requiring these generators to find alternate disposal locations for this material.

86. The financial impact on the two counties would be great. The financial responsibility, including the bonded indebtedness already incurred for facilities and planning, would be remanded to the Counties to be supported by the property tax system. The user fee system, where each generator pays according to his particular level of waste generation, would be eliminated and with it all financial incentives to reduce and recycle.

87. This is a public system developed at the public's demand. This local public system is not considered in or reflected in the March 1995 EPA report offered by the plaintiffs in their effort to deny the necessity, purpose and utility of the Oneida and Herkimer local solid waste management laws. These laws, and the subsequent integrated system approach are essential to accomplishing the public goals developed over many years. The plaintiffs portrayal of the EPA Report is selective at best, and generally: inconsistent with the 25 years of federal legislation and regulation designed to protect the environment and human health. The EPA Report is indeed nationwide, but not comprehensive. The report states "The Agency recognizes that local circumstances may differ substantially from the national perspective." The plaintiffs motion for summary judgement is a request for a very quick legal decision, but the EPA Report clearly states "If a State or local government has relied on flow control to achieve certain ends, sudden

elimination of flow control may disrupt ongoing solid waste practices." The EPA Report also discusses that rationales for flow control go well beyond financing: Flow control ". . . enables them (local governments) to respond to State recycling goals and mandates." The EPA report, through its method of obtaining data, does not accurately identify the present situation in our region. Better information, more recent and specific to our region, exists regarding the effects of flow control. In March 1995, the NYSDEC released a Flow Control Report, and also in March 1995, the New York State Association for Solid Waste Management (NYSASWM) released a Flow Control Survey Summary. We are currently attempting to obtain copies of all information from the reports to counter plaintiffs allegations. A review of this information by the court, and a fair non-selective examination of the EPA Report, will lead to different conclusions than those presented by the plaintiffs.

88. This action by six haulers, and their motion for summary judgement is a race to get a decision adverse to the Counties and the Authority prior to Congressional action (See Exhibit A-11).

89. The Oneida-Herkimer Solid Waste Management system is not just a well intentioned effort by a few earnest public officials. It is a system built because the public asked for it. It includes a wide range of facilities and programs, based on reduction and recycling priorities, that are necessarily integrated from a management and financial perspective. The system the public wants could not be provided if left only to the private decision making of haulers. The people of Oneida and Herkimer Counties should continue to have the right to ask for services, to set up a system that fairly allocates the cost and which encourages the community goals they've established. The newspaper articles attached as Exhibit A-12 illustrate the public participation and support of the system.

90. The statements contained in this affidavit are true to the best of my personal knowledge and belief. Documentation for the statements contained herein exists in the files of the various municipalities of the Counties, in the records of the State of New York, can be confirmed and elaborated upon by expert testimony, or is known to the plaintiffs. A fuller presentation of the evidence contained herein was not possible, despite the efforts of the defendants, due to the shortness of time afforded since the filing of the Complaint and this motion. The following is a partial list of reports, laws, regulations, and documents which serve as the basis of this affidavit.

1. New York State Solid Waste Management Act, 1988.
2. Resource Conservation And Recovery Act.
3. Comprehensive Environmental Response, Compensation and Liability Act.
4. Ludlow Landfill, Record of Decision, RI/FS Reports.
5. Quarterly Status Reports, Inactive Hazardous Waste Disposal Sites, NYSDEC.
6. 6 NYCRR NYS Part 360 Regulations.
7. Meeting Minutes, Hearing Records and Transcripts from the Development and Implementation of the Local Solid Waste Management Plan for Oneida and Herkimer Counties.
8. New York State Solid Waste Management Plans (Series, 1980-1995).
9. Where Will the Garbage Go? A series of reports from the New York State Legislative Commission on Solid Waste Management.

10. Organized Crime In Solid Waste Management, A Report From the Legislative Commission On Solid Waste Management.
11. Meeting Minutes, Hearing Records on Landfill Siting.
12. Approved Landfill Siting Methodology for Oneida and Herkimer Counties.
13. Home Rule Messages – Asking for Local Laws.
14. Home Rule Messages – Creating the Authority.
15. NYSDEC Flow Control Survey.
16. New York State Association For Solid Waste Management Flow Control Study.
17. Senate Bill S534 on Flow Control.
18. Authority Bond Documents, Indenture.
19. City of Utica User Fee Study.
20. Solid Waste Inspection and Compliance Reports.
21. Authority Fee Structure Resolution, 1995.
22. Authority Meeting Minutes Pertaining to Remington Arms.
23. Recyclables Contracts, Purchase Agreements.
24. Resource Recovery Project Grant, 8/85, Report on Waste Reduction and Recycling.
25. Solid Waste Practices and Citizen Attitudes Regarding Recycling in Oneida-Herkimer Counties, John Zogby Associates, 4/88.
26. Recycling In Oneida and Herkimer Counties, A Report of Research, Gordon S. Black Corporation, 6/13/91.

WHEREFORE your affiant respectfully requests that this court deny the motion of the plaintiffs for summary judgment, afford the defendants additional time to conduct discovery and to prepare and present additional evidence relating to the claims made in the complaint, and otherwise issue such order and grant such relief as may be just and proper.

Sworn to me

this 7th day of July 1995

/s/
William A. Rabbia
4986993
Notary Public State of new York
Appointed in Oneida County
My Commission Expires 9/30/95

/s/
Hans G. Arnold

Exhibits

A-1	Oneida-Herkimer Local Solid Waste Management Plan
A-2	Recycling Poster
A-3	Recycling Mill Letters
A-4	Letters Discouraging Recycling
A-5	Recycling Markets Graph
A-6	Public Participation in Recycling Graph
A-7	Plaintiffs' Permit
A-8	1/5/95 TSI Letter
A-9	Hauler letters
A-10	UHA Resignation Letters
A-11	Congressman Boehlert's Affirmation
A-12	Newsclips on Authority Programs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

Affidavit In Opposition to
Plaintiff's Motion for Summary Judgment

Robert F. Julian, being duly sworn, deposes and says:

1. I am a lifelong resident of Utica having graduated from high school in Utica and Utica College, and I am a practicing attorney. My law firm limits its practice to representing plaintiffs in personal injury and civil rights cases. Most of my caseload is in the area of medical malpractice. I am a member of the New York State Trial Lawyers Association, the New York State Bar Association, the Oneida County Bar Association and the Association of Trial Lawyers of America. I am a Board certified civil trial attorney and hold an A.V. rating by Martindale Hubbell. I am also a partner in several Utica businesses. I do not handle environmental cases and have declined offers to do so both during my service as a member of Oneida-Herkimer Solid Waste Authority and since that time.

2. I have had a strong interest in community service throughout my adult life. I chaired the Oneida County Charter Revision Commission in the early 1970's. I was first elected to the Oneida County Board of Legislators in 1977 and was elected Majority Leader in 1980. I currently serve on the Ways & Means Committee, Environmental Conservation Committee, and the Laws & Rules Committee. I served as Chairman of the Planning

Committee from January of 1978 through December of 1981 and as Chairman of the Resource Recovery and Solid Waste Committee from January, 1986 to the end of 1987 and Chairman of the Environmental Conservation Committee from 1/1/88 through 12/31/91. My only paid public sector jobs in the last twenty years have been as a County Legislator and as a member of the Oneida-Herkimer Solid Waste Management Authority. I presently contribute my salary after taxes back to the County or to charity. This has been my practice for years. I contributed all of my compensation from the Solid Waste Authority to Notre Dame High School in Utica as a charitable contribution.

3. In addition to my elected office, I am also active in community issues. I serve on the Utica College Board of Trustees. I am President of the New York Penn Professional Baseball League Experience in the City of Utica

4. I am personally familiar with the problems in solid waste management services encountered by the City of Utica over the last two decades. I watched during the 1970's when seemingly every waste collection bid by the City was met with only one proposal. And I became very concerned when I learned that the only bidder (Waste Management, Inc.) also owned the major landfill (Mohawk Valley) serving the region. As can be documented through inspection of the City's files, there were regular price hikes for collection and disposal and yet there was essentially no competition for the collection contract. I have attached some newspaper articles which recorded Waste Management Inc.'s activities and the financial impact on the city (see Exhibit J-1).

5. In 1984, the City was unable to get any other companies to bid on the collection contract because Waste Management, Inc. owned the local landfill, thereby allowing them a unique advantage in the bid. Browning Ferris Industries specifically declined to bid for that reason. Waste Management had a lock on the City waste collection and disposal contract (see Exhibit J-2).

6. Evidence will show that Waste Management used the Utica collection contract as leverage to keep their local landfill open. As indicated in a 12/14/82 letter by County Planning Commissioner Michael Gapin, if Waste Management, Inc. didn't win the collection contract they would likely choose to close the local landfill, thereby placing the region in a disposal crisis (see Exhibit J-3).

7. In only looking at a single instance, Waste Management doubled the disposal rate at the Mohawk Valley Sanitary Landfill in 1986 giving customers only six weeks notice. No basis for the increase was stated and it came in the middle of Utica's three-year contract. City Engineer John Zegarelli noted the "drastic" financial impact on the City in a 9/18/86 Daily Press news article. Zegarelli suggested that a new regional waste-to-energy facility would be the long-term answer for the region (see Exhibit J-4).

8. Information in the City files will show that the company that won each collection contract and which owned the landfill (Waste Management, Inc.) did not install a system of scales for weighing and assessing fees. They "estimated" the volume of waste they collected in the City. When the state finally forced the installation of scales in 1991 the hard fact was that they had "overestimated" the

waste volume by 30%. For 20 years, or possibly longer, City residents were grossly overcharged for solid waste services.

9. This experience in Utica demonstrated that a solid waste service, if left totally to the private sector, would leave an inordinate risk of significant overcharging and other unfair and predatory practices. This experience early in my public life demonstrated that the totally private approach to waste management had failed and that my community needed a system to meet the public needs and protect the public interests.

10. More recently, another pervasive and completely unacceptable outcome of totally private control is indicated by the recent action brought by Manhattan District Attorney Robert Morgenthau culminating a five-year investigation into organized crime's control over the City's commercial waste. The New York Times account of the activity tells a story of price fixing that caused consumers to pay rates inflated by 40% and of threats and violence to enforce organized crime's "service areas" (see Exhibit J-5).

11. When the County Solid Waste Management Laws were put in place in 1988 and Utica's disposal needs could be met by a public system managed by the Authority, several positive results were realized by the City. For the first time in 20 years, several firms submitted bids for collection. No longer held hostage to the private sector disposal services, the cost of collection came down. City residents saw a direct financial benefit. For the first time, the playing field was made level, the rules were the same for everyone.

Local Solid Waste Problems

12. If Oneida and Herkimer Counties, and their local governments, had not acted and had left the private disposal industry to develop a landfill, the public's interest would not have been served. The only significant private sector effort to site a landfill in this community was Waste Management's effort to expand the environmentally questionable Mohawk Valley landfill in Frankfort. The County's elected representatives saw this and made a necessary commitment, on the public's behalf, to investigate feasible options and secure a public system that could avoid these problems in the future.

13. During the 1980's there was an avalanche of solid waste problems. The public began to understand that solid waste was more than just an inconvenience or a nuisance to be endured. People living near landfills and many other less "formal" waste disposal sites became legitimately concerned and genuinely fearful. They viewed waste disposal practices as an environmental assault on their land and water and homes. Citizens' groups formed and cries for closing landfills grew louder. People demanded a new approach, an approach that would cut down on waste and protect their safety. Locally, the issue of proper management of infectious waste was also a cause for significant public concern. Hospitals, often located in or very near residential neighborhoods, were relying on outdated incinerators to burn all categories of infectious waste. In addition to the strong and objectionable odors, neighbors became very concerned that they were being subjected to a health hazard, ironically caused by a health care facility. People came to our meetings and demanded that these incinerators be closed, and that we address this problem for the long-term. Many of these

concerns and strongly held beliefs were reported in hundreds of newspaper articles (see Exhibit J-6).

14. Elected officials representing towns, villages and cities were the first to be confronted with solid waste issues. Their residents pressed for action. The state reacted and began mandating local governments to make large new expenditures to upgrade their landfills and protect streams, groundwater, and public drinking water supplies. In the early 1980's the County Environmental Health Director issued orders not to drink the water emanating from areas near several local landfills. Residents expressed opposition to the importation of waste from outside the area.

15. Although it is not intended as an exhaustive list, elected officials from at least the following Oneida and Herkimer County communities were faced with serious and immediate solid waste problems: Utica, New Hartford, Rome, Whitestown, Annsville, Boonville, Camden, Vienna, Verona, Augusta, Clinton, Waterville, Paris, Bridgewater, Forestport, Oriskany Falls, Webb, Ohio, Salisbury, German Flatts, Ilion, Mohawk, Little Falls, Herkimer, Frankfort. These elected officials, representing a combined population of over 300,000 recognized the need for a coordinated, regional approach to develop a safe, solid waste management program. Given adequate time, a significant number of local elected officials will confirm that they, and the public they represent, clearly saw the need for the County to develop a public system.

16. In 1983 the state reported that most of the landfills in the area were operating without permits and that very few were in compliance with state regulations. At the same time, the state started identifying hazardous

waste sites. During the 1980's in Oneida and Herkimer Counties over 40 sites were identified and at least seven of these were classified as posing a significant threat to the environment and public health. In the years following, 16 waste disposal sites were required to close and remediate the surrounding environment at a total cost of over $74 million. The public's share of that cost exceeded $67 million.

17. In addition to the developing awareness of local elected officials and state regulators, the community saw first hand in the 1980's the problems and risks that had been created by private landfills and waste disposal practices. At various times the state included on their hazardous waste site lists the Mohawk Valley Landfill in Frankfort, the Ludlow Landfill in Paris, the Empire Recycling and Universal Recycling scrap yards in Utica, and the Guerriero Landfill in Frankfort. While many sites were operating without permits and out of compliance with regulations, there was an even more revealing trend when Attorney General Robert Abrams conducted a "sting" operation in 1986. Landfills in our area – including Ludlow's and Guerriero's – accepted what they were told was toxic waste. Abrams said it was "disturbingly easy" to dump illegal wastes at some landfills and that "the threat from toxic chemicals is so serious, even one incident of lax security is too many" (see Exhibit J-7).

18. Disposal at Mohawk Valley Landfill also raised concerns about the financial exposure to Utica residents, given their past use of the site, in the event of a state or federally mandated remediation. Before 1985 there was little choice as to which landfill waste would go. And most landfills were equally

bad. But the message from Congress on the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Resource, Conservation and Liability Act (CERCLA) taught everyone that no share of responsibility for an environmental problem is small. When the County readied to open the Energy Recovery Facility in 1985 I strongly opposed a proposal to use the Mohawk Valley Landfill for disposal of ash because it would have opened the door to a significant liability. Instead, the County Legislature voted to spend the money to build a new double-lined landfill to make sure the environment would be protected and that the public would not be subjected to an unlimited financial exposure.

19. This part of the experience with solid waste management awakened everyone that we, as a society, had created serious problems that would now be revisited. Local officials were on the firing line. The public was outraged.

The Ludlow Landfill

20. There were a series of developments involving the private Ludlow Landfill in the Town of Paris that had great local, state and national significance. These developments had significant bearing on the public's attitude toward how solid waste is managed and what their responsibilities are. I was Town Attorney for Paris while the landfill was in operation and when it was listed as a hazardous waste site.[1] The Ludlow Landfill was identified as a hazardous waste site by the State Department of Environmental Conservation because PCB's (polychlorinated biphenyls) were detected in and around the landfill.

---

[1] The NPL, on information and belief, now contains a listing of over 2,500 sites, many of which contain municipal solid waste from homes.

In 1982 the site was placed on the National Priority List which identified 418 sites nationwide requiring priority attention to eliminate significant threats to public health and the environment. The Ludlow site was among 26 such sites in the state and the only site in Oneida County. The owner of the landfill never obtained a state operating permit, but had accepted waste collected by private haulers from many local citizens.

21. My main concern in representing the Town was to insure the protection of public and private water supplies which might be contaminated by the landfill. I arranged for hydrogeologist Dr. Herman S. Muskatt to prepare a report on the landfill and in April 1983 he submitted his findings indicating:

    - No measures were taken to prevent groundwater contamination.
    - Leachate was discharging to surface waters.
    - There was a potential for leachate from the landfill to eventually effect the water supply of homes and the Clayville water well west of the landfill.

22. Following this, the Town took every reasonable step to monitor the potentially impacted water supplies and to press for closure and securing the landfill so that future problems would be eliminated.

23. Soon thereafter, investigations at Ludlow brought home to the community the new degree of risk and responsibility for solid waste management. Although the regulators, engineers and geologists charged that the source of the PCB's was principally one or two local industries, lawyers for those industries filed a sweeping action in Federal District Court against 603 third-party defendants.

The action was to collect money from all these defendants to pay for the federally mandated remediation. The two industries sued local businesses including fabric stores, grocery stores, restaurants, school districts, country clubs, and 29 local governments. These local businesses were generators of typical, traditional solid waste – not hazardous waste. Yet, under CERCLA they were found responsible for paying for a share of the clean-up. I found that a comment recorded in 12/2/90 Observer Dispatch article best reflects the public's new found recognition of their long-term responsibility:

> "Everybody in the Country is going to be responsible up to 20 years ago for whatever they threw out, and for whatever their garbage man might have done with it."
>
> Edward A. Zammiello, Jr.
> Co-Owner Frank' s Body Works
> (see Exhibit J-8)

24. As this community watched, studied and in many cases paid huge costs as the Ludlow Landfill case unfolded, we saw clearly that there had to be a significant public role in managing our solid waste. As a community we could not risk repeating the expensive path of the past.

Reduction, Resource Recovery & Recycling

25. By the mid 1980's this region was suffering from a severe solid waste crisis. A continually increasing mass of undifferentiated solid waste was being generated and was a problem of tremendous proportion. The state moved first to close the older public landfills like Northern Oneida County (NOCO), Rome, and Utica. The private sector made

no effort to solve the problem, they only sought to keep their landfills open and operating at a profit. Pitched legal battles were fought to keep Ludlow, Mohawk Valley and Guerriero open, even though they didn't have permits and couldn't comply with the environmental standards of the day. The private sector showed no ability to handle the region's problem even for the short-term. The County took a major step forward by opening the Energy Recovery Facility in Rome to handle waste from the Western part of the County. The private sector make no effort toward this type of resource recovery and it took necessary action by the County to move away from private sector disposal into a method that would reduce our dependence on private landfills. This commitment by the County also represented a strong link with one of the region's major employers, Griffiss Air Force Base.

26. The private sector was making no effort at waste reduction and recycling. No significant private sector household waste recycling program existed in this county before or during the 1980's. The private sector waste disposal industry profits and, therefore, their viability are inexorably linked to increasing the volume of waste. Large-scale community-wide recycling would have reduced waste and reduced their profit. So they would never start recycling without a public requirement to do so.

27. The County Charter imposes upon the County Legislature the duty to make policy for the County. In developing a sound long-range waste management public policy, we recognized the need for a change. Experience was showing that we needed to reduce the volume of waste, develop markets for recyclables, provide opportunities for recycling and provide for environmental protection and security.

We could not let the public's health, safety and welfare continue to be imperiled by the slip-shod solid waste practices endemic to private sector disposal.

28. The approach ultimately started to address these problems, disposal after a vast amount of study and public participation, was to develop a public system.

Public Solid Waste Management Policy

29. As anyone who reads a newspaper knows, and as any elected official who has served on a solid waste committee will tell you, there is no public issue that surpasses solid waste for the public interest and participation.

30. As a county legislator I listened to years of public comment before the Energy Recovery Facility (ERF) was built. The County upgraded the pollution control system for the plant in response to public comments. We later voluntarily instituted annual stack testing to confirm compliance with standards. As the ERF was being developed, the public said that the County should have a more aggressive recycling program. When we sited the Energy Recovery Facility in Rome in the early 1980's, there was strong citizen input in favor of a countywide recycling system.

31. The public called on the County to find a solution to the massive solid waste problem. At a September 1986 meeting of local waste haulers, *two of the plaintiffs in this case*, as well as the other haulers in attendance, called on the County to develop a new public regional landfill as a safeguard for the pending closure of the Mohawk Valley Landfill. The private haulers then recognized the need for security, just as they did when the Ludlow litigation shook

their financial security, and they called on the County for a necessary public solution. Now a few of the same haulers seek to completely tear down what they asked the County to do – once the public is irrevocably committed.

32. As the Chairman of the Environmental Conservation Committee, I was involved in bringing together towns, villages and cities and then Herkimer County to formulate an organized regional approach to solid waste management. Supervisors and mayors had been stung by expensive landfill closures and citizens demanding a new approach. Local newspapers editorialized urging action by the Counties (see Exhibit J-9). By 1987 the municipal boards from a number of communities representing the majority of the region's population had approved a contractual commitment toward the development of a county sponsored regional solid waste system.

33. These contracts were a clear and decisive action by local governments that they wanted the County to consolidate solid waste services, develop a regional plan, and create the long-term safe and secure system that only could be done by the public sector. The entire series of contracts among the local municipalities and Oneida County and Herkimer County were and are integral to the development of our public system. With the appropriate time, all these documents, and all proceedings and related documents, should be examined and prepared for the Court as they will further show the basis for the Oneida-Herkimer system.

34. The long and painful experience of citizens and their local elected officials led them to ask the Counties to take a leadership role. I know because I was there, I met with these people and I heard their plea.

35. In an opinion poll conducted by a professional firm in 1988, residents overwhelmingly said that garbage posed a serious problem. The public agreed with and demanded that we develop a system to reduce and recycle. Over 71% said that the recycling should be mandated by local law and 66% said they'd be willing to pay extra for a recycling program (see Exhibit J-10).

36. By definition, only a public sector initiative could make that work. The private sector was not recycling. The counties had to respond to the public's demand. The counties had to be involved to institute a system that would reward waste reduction, develop markets, and provide the significant and necessary subsidy for recycling to make it happen. The private sector proved then and now that they were driven by higher waste volumes and would only recycle highly profitable items. Who is to handle the cost of disposing of recyclables when the market is down? The private sector certainly would not and could not, then or now.

37. It became clear that public involvement was essential to insure that the public policy goals of reduction, recycling and environmental safety would be met.

New York State's Public Policy Role

38. In the early 1980's, the public's vocal concerns about solid waste management and the recognition, by state elected officials that they had to address the problem, led to the creation of the New York State Legislative Commission on Solid Waste Management. This Commission, under the leadership of Assemblyman Maurice Hinchey, Executive Director Gordon Boyd, and Attorney Lawrence Schillinger (now a representative of the plaintiffs), moved to chronicle all major solid waste problems and to then develop

state legislation to meet the long-term public objectives.

39. The Commission gathered data, held hearings and convened inquiries including depositions of waste haulers thought to be involved with organized crime's monopoly of solid waste services in part of the state. In addition to the issue of organized crime's involvement and control of the private waste industry, the Commission also studied issues including price fixing, illegal disposal, environmental damage from waste disposal facilities and practices, emissions from waste-to-energy plants, the need for more protective environmental standards, the creation of recycling markets, the problems of burgeoning volumes of packaging waste, and viable community source separation programs.

40. I met on numerous occasions with Assemblyman Hinchey to discuss the developing state policies and our own system in Oneida and Herkimer Counties. At my invitation, Assemblyman Hinchey came to our region several times; he toured our facilities and he met with our County Legislature. In my discussions with Assemblyman Hinchey, he also recognized the need for strong state and local initiatives to move away from the bad practices of the past into the new environmentally conscientious system of the future. He saw that the private sector would not make these changes because their interest was in keeping old facilities open as long as possible and in increasing the volume of new solid waste. He recognized the private sector's action in many areas to monopolize control, drive out competition and then establish a system without consideration of the communities' and the state's public policy goals.

41. Assemblyman Hinchey sponsored and forged approval of bold new state legislation that provided a policy framework for future solid waste management. This legislation, known as the Chapter 70 Laws of 1988, required that source separation recycling laws be adopted by all localities by 1992. This legislation called for establishing "planning units" to promote a regional and coordinated approach to developing a public solid waste system. The legislation set in motion programs and incentives to create new markets for recyclables. The centerpiece of this legislation was the clearly articulated public policy that there should be a hierarchical approach that makes waste reduction and recycling the first priorities. It established a clear public policy mandate and the necessity for public involvement.

42. The Legislative Commission not only initiated major proposals, they also reviewed, and controlled, the consideration of all requests for solid waste legislation from local governments. The statutes creating public benefit corporations, like the Oneida-Herkimer Authority, and authorizing localities to direct their waste (flow control) for development of a local integrated system, must all be approved by the Commission. The Commission insures that the laws, prepared at a home rule request, are consistent with the state purpose and with all public policies as set forth in state law and regulation. The interests, policies and goals of the State of New York were embodied in the state statute creating the Authority. The State's interest was and is coincident with that of the Counties.

Public Hearings

43. As Chairman of the Oneida County Legislature's Environmental Conservation Committee, I held hearings and collected testimony on the wide range of solid waste issues facing our community.

44. The records of the multitude of hearings held on the following topics, together with the submission from groups including, but not limited to those below, will demonstrate conclusively that the purposes of the plan and legislation later adopted were to create an integrated public management system for all waste generated in the Counties. This voluminous material is available, but could not be fully examined and prepared for submission to the Court in the brief time allotted for response to plaintiffs' motion. However, there was an unprecedented broad base of public involvement, and I particularly noted that private citizens, environmental groups and industrial representatives all participated extensively. In the case of the latter, representatives of our region's major industries including Revere Copper and Brass, Rome Cable, the Original Herkimer Cheese, and the Mohawk Valley Economic Develop Council, were very supportive of a regional and public system to resolve the solid waste problem.

Major Hearings - Topics

- Integrated System
  - Nature of Problem
  - NYS Hierarchy
  - Recycling Markets
  - Public Health Risks
  - Waste-To-Energy
  - Methods of Charging and Paying
  - Creation of Authority
- Recycling Markets

- Infectious/Biomedical Waste
- Mohawk Valley Landfill
- DGEIS/DLSWMP (series)
- Waste-To-Energy
- Agriculture

Participating Groups

- Interested private citizens
- Izaak Walton League
- Cooperative Extension
- Regional Economic Development Council
- Utica Area Chamber of Commerce
- Major Local Manufacturing Industries
- NYSDEC
- Scrap Industry
- Environmental Groups
- Recycling Industry
- Local Elected Officials
- Local Hospital Administrators
- Farm Bureau
- Environmental Management Council
- Educators

The Local Solid Waste Management Laws

45. There was a strong, broad-based consensus among citizens, businesses, industries and local elected officials that there had to be a regional and public system of programs and objectives of Oneida and Herkimer Counties. Based on extensive facilities to serve the solid waste management needs and interaction with the public, it was clear that they wanted a new recycling based approach. They wanted their duly elected representatives to put a solid waste management system in place that would increase and reward waste reduction, require recycling and make sure that the environment and their health and safety was protected.

46. The county legislators then took action in response to the concerns and demands of their constituents. I prepared a draft of a local law to meet the following objectives:

    - To replace high volume, undifferentiated waste and disposal with a system that would match the best management method to each component of solid waste. The draft local law created separate provisions for each major category of waste.
    - To make waste reduction and recycling the legally mandated top priorities for solid waste management in the County.
    - To establish and expand markets for recyclables.
    - To protect the public health, safety and welfare by requiring regular collection and environmentally sound waste processing and disposal throughout the Counties.
    - To stop backyard burning and roadside dumping of waste.
    - To make sure that both recyclables and waste would be set-out at the road, by waste generators, in a form and manner to insure its proper delivery to the recycling and disposal facilities.
    - To establish a basic framework of responsibility, consistent with state and federal laws, for waste generators, haulers, towns, villages, cities and the county or its agent.
    - To conserve vital natural resources.

47. After preparing the draft local law and reviewing it with legislators from Oneida and Herkimer Counties, the Environmental Conservation Committee met with local governments by attending their regular

board meetings in order to gain input on the draft. It was presented at numerous meetings of service clubs and civic groups. A series of six advertised public hearings were held around the region on the draft local law. Input was sought and received from a broad cross section of the public.

48. The broad-base of public input allowed us to improve and refine the local law. The extensive input received at hearings indicated overwhelmingly that the public wanted the County to develop a solution to the solid waste problem and to adopt a local law as the legal basis. The public asked for the following changes in the draft which were made before the local law was adopted:

    - Increase penalties for violations.
    - Tighten prohibitions against backyard burning and roadside dumping.
    - Include a permitting system for haulers.
    - Allow businesses and industries to market their recyclables without direct involvement in the County system.

49. The local solid waste management laws were heralded as landmark legislation leading the community to a new and better way of managing a difficult problem. Oneida County was the first New York county to pass mandatory recycling legislation (see Exhibit J-11).

Implementation Of The Public System

50. Elected county legislators, on behalf of and at the request of their citizen constituents, made commitments to the development of a public solid waste management system that would make reduction and recycling the first priority and would

create an integrated, comprehensive, systematic and environmentally sound program. As the elected representatives, we then had to consider the best way to implement the system.

51. The Counties evaluated a number of alternatives for an organizational and administrative structure to carry forward such an effort. Alternatives included districts (part-county and multi-county), inter-municipal agreements, agencies, departments and an authority. Additional meetings were held with local elected officials, who were invited to again provide input on the structure that should be created for the development of such a system. There was a need to make sure that this effort would be done in an efficient, business-like manner, and that public accountability would be maintained. Because this system would require not only significant capital outlay but also the undertaking of several important but individually unprofitable programs, the approach would have to be able to use the most equitable financing mechanisms available.

52. There was a consensus of the county legislatures that the creation of a public benefit corporation (authority) could best serve these needs. A home rule request was adopted by each County legislature and forwarded to the State. On September 1, 1988 the Governor signed the Public Authority Law authorizing the creation of the public benefit corporation: the Oneida-Herkimer Solid Waste Management Authority.

53. The statute authorized the Counties to create the Authority, appoint its board of directors and establish, through subsequent agreements and contracts, the parameters of the Authority's function and operation. The state statute, enacted at the home

rule request of both county legislatures, authorized the Counties, through the Authority, to establish a public monopoly system for managing solid waste in the region. I was appointed to the Authority Board and elected its first Chairman.

54. The Counties worked carefully to comprise a Board of Directors that would make decisions based on the best long-term interests of the entire two-county region. The Counties looked to lay professional people like Dr. Guy Wilcox, who was Medical Director for St. Luke's Hospital and an infectious disease specialist. He had been involved in the Hospital's efforts to improve their infectious waste management. Dr. Michael Lane, a Ph.D. in geology, was brought on to provide expertise in the siting of facilities in environmentally sound areas. Frank Dolan, a registered professional engineer, was appointed because of his expertise in public utility systems. Robert McLaughlin was the founding President of Herkimer County Community College and offered the experience of developing responsive educational programs. Gerald Brodock brought to the Board the experience of a career as negotiator for Revere Copper and Brass and as an individual who started, owns and operates a local manufacturing company. Barbara Freeman was appointed because she was recognized as the leading environmentalist in this region, and as a life-long school teacher she could help with environmental education. Harry Hertline was appointed because of his experience as a contracts negotiator with General Electric and his public service as a county legislator. David Link brought the perspective of a small businessman who works with environmental regulations. R. William Burrows was recognized as a business leader in the region, owner of a local bank, and owner of a local

and international paper manufacturing and paper recycling industries. The combination of expertise comprised on the Authority Board provided the highest quality representation of our community.

55. Although the Authority became operational in 1988 and provided a means of administering the development of the system, there was also a need to define the basic relationship among the Counties and Authority and to define the responsibilities of each. The May 1989 Agreement did this and its essential provisions include a formal agreement that:

- The Authority was created for the express purpose of providing for the management of solid wastes generated within the Counties on a regional basis.
- The Counties determined that it is in the public interest to have the Authority provide a system for the proper management of solid waste on their behalf.
- The Authority would agree to lease or buy the existing facilities (and those under development) of and from the Counties.
- The Authority agreed to secure all other necessary facilities and programs to manage all the region's solid waste.
- The Authority agreed to finance waste management activities on a revenue basis, recognizing the equity inherent in such a system and to set disposal (tipping fees) at the level to cover all operating and debt service obligations.
- The Counties agreed to deliver or cause to be delivered all waste and recyclables to the Authority facilities.

56. Very recently another County Legislator and I conducted a survey of our legislative districts which include Uticans who live in South Utica, Cornhill, and West Utica to gauge their opinions on key local issues. Uticans favor regionalization by an incredible 21-1 margin. On the solid waste issues, 89% said the Authority is doing a good job with its recycling programs and 75% said the Authority is doing a good job in its efforts to locate a new two-county landfill. This survey shows that Uticans are calling on the elected officials to move on regionalization, consolidation and cooperation, just as was done with the solid waste management system.

57. The provisions in the May 1989 Agreement committing the Counties and the Authority to a revenue-based financing method for the system costs expected to be incurred was a deliberate choice among several financing options. The subject of finance, and particularly the equitable distribution of the financial burden of the system, had been a topic at public hearings, legislative debates and planning sessions on the proposed system.

58. The Counties were quite familiar with a variety of financing options available for the provision of solid waste services under the Constitution, Tax, and Municipal laws of the State of New York. Because it had been agreed for purposes of efficiency and accountability to commit to the Authority the responsibility for managing the system and making financial expenditures without duplicative County efforts, funds for this purpose had to be raised from the public and directed to the Authority.

59. Two broad options for raising necessary funds presented themselves, whether implemented by the

Counties (and passed on to the Authority), or by the Authority directly. The first was the use of real property taxation, via general ad valorem taxes, special district charges, user fee assessments, or pursuant to the Authority's power to levy charges against real property in the Counties under Public Authorities Law § 2049-33(14). The second was the use of tipping fees for waste handled and disposed of by the Authority.

60. The option of cost distribution for solid waste services on the basis of the value of real property in the Counties, or a system whereby uniform user charges would be apportioned to parcels of real property, was rejected as inequitable, if not presumptively irrational. There is no necessary relationship between the value of any piece of property and the value of the solid waste service it requires or consumes. Some relatively low value properties in the Counties actually generate very high volumes of waste, and therefore consume a proportionately larger share of the solid waste service provided by the Authority, than higher valued properties, which may often generate little waste. Additionally, both Counties have a significant and higher than average proportion of tax exempt property.

61. Consequently, taxing property for waste services based on the value of the property creates a windfall for those properties of low assessed value but which consume a large degree of waste services. Similarly, assessment of a user fee to all properties, regardless of assessed value, is inequitable for the majority of properties, since the average value of services consumed by each property is skewed upward by the fact that a relatively few properties generate far greater than average amounts of waste. Moreover,

charging from the real property tax base for waste disposal was unfair to cities like Utica and Rome with a high percentage of tax exempt properties.

62. Finally, it was recognized that no fixed correlation between the value of services to property was even desirable, as the goal of the system was to fundamentally change the public's waste generation habits: to reduce overtime, the amount of waste generated and increase recovery through recycling.

63. The City of Utica was also coming to a similar recognition in terms of how they would fund the cost of providing solid waste services. They wanted to get away from the inequity of property tax system and to give incentives to residents for recycling. We funded and jointly conducted a study with the City which evaluated different ways this might be accomplished. With adequate time for a full examination of this report, it will be clearly demonstrated that alternatives were carefully examined and that a user fee approach was, and is, the most fair and equitable. This work was the basis for the City's decision to institute a user fee system that would have each resident purchase a designated bag for their waste disposal. The price charged for the bag was set to cover the cost of providing the service. A direct economic incentive was thereby created to encourage each resident to reduce their waste and recycle as much as possible. This system, now in place over six years, works. Utica has among the best recycling rates; people pay for the amount of waste they generate (and they can save money if they recycle more), and the tax base is not burdened.

64. For these reasons the Counties determined to finance the waste management system through fees charged

to users of its facilities based upon the amount of waste delivered (tipping fees).

65. The practice of the waste collection industry, then as now, is to bill the waste generator or customer the cost of both collection service and the anticipated disposal fee to be paid to the disposal facility. The collection firm serves as a conduit for disposal costs paid by the generator to the disposal facility, and with Authority fees set at uniform amounts for all haulers and generators, the cost burden is borne by generators in direct proportion to the amount of waste each sends to the disposal facility.

66. In addition, the tipping fee system enables the Authority to provide incentives for recycling and waste reduction by accepting recyclable materials without charge, while financing commercially unprofitable, but environmentally valuable programs, such as household hazardous waste collections, with revenues derived from deliveries of non-recyclable waste. The broad incentive to all citizens is to generate less waste by diverting larger fractions to recyclable markets. Citizens who recycle more waste at an earlier point in time save more money sooner than citizens who join the program late. In that way the financing structure not only assesses costs equitably, but advances the goals of the system in a way that a private market system could not.

67. The adoption of the tipping fee method of financing did not absolve the Counties of all financial responsibility for the operation of the system. The Counties remain, and were intended to remain, financially responsible for the operation of the system to the extent that the primary financing method cannot do so. Moreover, the Counties clearly provide the ultimate security for the bonds of

the Authority, as set forth in the December 1989 Agreement submitted to the court by the plaintiffs.

68. The statements contained in this affidavit are true to the best of my personal knowledge and belief. Documentation for the statements contained herein exists in the files of the various municipalities of the Counties, in the records of the State of New York, can be confirmed and elaborated upon by expert testimony, or is known to the plaintiffs. A fuller presentation of the evidence contained herein was not possible, despite the efforts of the defendants, due to the shortness of time afforded since the filing of the Complaint and this motion.

WHEREFORE your affiant respectfully requests that this Court deny the motion of the plaintiffs for summary judgment, afford the defendants additional time to conduct discovery and to prepare and present additional evidence relating to the claims made in the complaint, and otherwise issue such order and grant such relief as may be just and proper.

Sworn to before me
this 5th day of July 1995

/s/ Robert F. Julian
Robert F. Julian

/s/Tracey A. Synakowski
Tracey A Synakowski
Notary Public, State of New York
Qualified in Oneida County
(No. 4862486)
My Commission Expires Sept. 2, 1996

EXHIBITS

J-1	Newspaper articles WMX monopoly on city collection, cost impact.
J-2	BFI letter.
J-3	12/14/82 Gapin letter to Pawlinga.
J-4	9/18/86 Daily Press Article.
J-5	New York Times Article.
J-6	Avalanche of problems.
J-7	Abrams sting news article.
J-8	Ludlow article – Zammiello quote.
J-9	Editorials urging County action.
J-10	1988 John Zogby Poll.
J-11	News article July 88 Passage of Local Law.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

Affidavit in Opposition

MICHAEL A. GAPIN, being duly sworn, deposes and says:

1. I reside at 3161 Fountain Street in the Town of Kirkland, Oneida County, New York, and I am the Program Director for the Herkimer-Oneida Counties Comprehensive Planning Program and Commissioner of the Oneida County Department of Planning, positions I have held since 1978.

2. Beginning in 1970, and prior to the formation of the Oneida County Department of Solid Waste Management and the Oneida-Herkimer Solid Waste Management Authority, my responsibilities included examining the two-county region's solid waste management practices and planning solutions to any problems identified. During this time period, a number of solid waste management planning and feasibility studies were conducted by or on behalf of the counties, either under my direction or with my substantial involvement. As Commissioner of Planning for Oneida County, I was heavily involved in the siting, planning and permitting of the Oneida County Energy Recovery Facility and lined Ash Landfill that served the western Oneida County and greater Rome area.

3. One of the fundamental principles of community planning and economic development is that there are three basic public "utility" functions which are essential to the economic and environmental well-being of a region. These are the provision of systems for a clean supply of water, for treating wastewater discharges, and for managing solid waste. In order for an area to be viable, it must be able to provide its citizens, businesses and industries with these three

essential systems. For each, the system must provide safe, reliable, consistent service. In order for an area to grow, to bring in new development and job creating industries, these basic pieces of public infrastructure must be in place. They are essential elements of good economic policy. They are no less important to a region's viability than roads, bridges and schools.

4. If a community establishes the public policies to secure and develop these systems, the community has taken a major step in enhancing and securing its future. A community, as part of these public policies, can establish community goals such as creating expansion capacity to attract new development. And, in the case of solid waste management, a community can develop a secure public system for the long-term that advances resource conservation, reduces dependance on disposal and provides environmental and economic security. The public policies developed in these two Counties for all three of the major public utility systems have been working toward securing the region's viability for the future. All three public utility systems are essential to our future.

The Old Town, Village and City Dumps

5. In the 1960's, virtually every municipality in Oneida and Herkimer County had a landfill. In most cases, the landfill was owned and operated by the town, village or city although there were also a few privately owned landfills in the region. Providing a landfill for use by local residents and businesses was traditionally viewed as one of the services to be provided by local governments. The costs to run the municipal landfill were typically part of the overall municipal budget, with proof of residency being the primary requirement to gain entrance to the landfill. If user fees or other gate charges were involved, they were generally for a nominal amount.

6. These landfills were typically sited in wetlands or gravel pits, with the landfill being seen as a way to fill in these areas. The early regulations governing their siting and operations were minimal, and in general focused on minimizing nuisances that a landfill could cause. In 1966, for example, Part 19 of the State Sanitary Code set forth the requirements for converting an open dump to a nuisance-free "sanitary landfill":

a. General clean up of the dumping area.

b. Extensive poisoning program to eliminate rodent population.

c. Compaction, covering and grading of existing refuse.

d. Planning and developing the site in a comprehensive manner.

7. In response to a number of inquiries that had been received from municipal officials, our office prepared a memorandum dated December 16, 1966 regarding "The Control of Garbage Dumps and Refuse Disposal" that was sent to all Mayors of Cities and Villages, Supervisors of Towns, Planning Board Chairmen and Attorneys of the two-county region. This memorandum noted that with an ". . . increase[d] emphasis on the elimination of water and air pollution and the control of unsanitary dumping operations every municipality will be faced with the review of its refuse disposal practices." This memorandum also noted that ". . . as part of the Public Utility Study being undertaken by the long-range planning program, a private engineering consultant will review the solid waste problem and develop alternate schemes for regional solutions for disposal." This memo indicates that, as early as 1966:

a. Many local municipalities were experiencing pollution-related solid waste disposal problems.

b. Local municipalities were looking to have their solid waste problems addressed on a regional level.

c. Solid waste disposal was considered to be part of a municipality's infrastructure, appropriate for inclusion in a Public Utility Study.

A public solid waste management system is no less important to a region's viability than adequate drinking water and wastewater disposal systems.

8. The 1969 Comprehensive Solid Waste Planning Study prepared for Oneida and Herkimer Counties reported a total of 44 open dumps operating in the two-county region. At the time, neither county was involved in owning or operating a disposal facility, nor were the counties involved in any other aspect of providing solid waste collection, disposal or recycling services to local residents and businesses. All of these solid waste management services were being provided at the local level.

Growing Concerns About Environmental Impacts of Landfills

9. In the mid to late 1960's, there was a heightening awareness of environmental impacts that were being caused by operation of the old local dumps. The public was becoming increasingly concerned about drinking water contamination, disease carrying vectors, open burning and the potential for other public health and environmental problems that were associated with historical and, at the time, on-going waste disposal practices at unlined landfills (i.e., open dumps).

10. The federal government took some initial steps to address these growing concerns, by enacting the Solid Waste Disposal Act in 1965. This new law provided 50-50 matching federal grants to encourage state, solid waste planning, and two-thirds matching funds for local waste

management demonstration projects that offered alternatives to open dumping. The National Environmental Policy Act, adopted in 1969, provided some early encouragement for development of community recycling programs, and the 1970 Resource Recovery Act promised financial assistance and technical support for states that would prepare solid waste management plans.

11. New York State responded to increasing public concerns about environmental issues by establishing the State Department of Environmental Conservation (DEC) in 1970. This new department took over the regulation of landfills from the health department, although at the time these regulations (Part 19 of the State Sanitary Code, as noted above in paragraph #6) were extremely limited. Passage of the New York State Environmental Quality Bond Act of 1972, which allocated $175 million of matching grant funds for municipal waste projects, provided a source of significant financial assistance for municipalities to improve or develop new solid waste management facilities. Of this $175 million, $5 million was reserved for small scale low technology approaches to recycling and resource recovery.

12. Conditions at the local landfills justified the attention that national and state policy makers were giving to environmental and solid waste issues. The 1969 Comprehensive Solid Waste Planning Study noted that ". . . most of the collected wastes are disposed of in open dumps. Operation of all of these dumps lacks proper control, financing, equipment and operating techniques . . . operations are not in conformance with present State laws. Water and air pollution and health hazards at these dumps can no longer be tolerated." The study further documented potential hazards from the existing dumps to include water pollution, dust, odor, combustible gases, fires, settlement, air pollution, and vector borne disease.

Love Canal and CERCLA Liability

13. The Love Canal incident in western New York drew national attention to the problems of toxic contamination -- many residents were relocated and their properties purchased due to the discovered contamination. The level of public outrage provoked by Love Canal, as well as similar problems at sites throughout the Counties, is largely responsible for Congress's passage of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA, which is commonly known as the "Superfund" law). The Superfund law established the legal framework for financing and remediating sites contaminated with hazardous wastes. New York State has established a similar Superfund program, through the adoption of amendments to the State's Environmental Conservation Law in 1979 and 1982.

14. The Superfund program established a standard of "strict, joint and several liability" for determining who would pay for site clean-ups. Owners and users of some old local dumps are now faced with the prospect of having to pay for site remediation activities that will cost several million dollars at each site. The question of how much each responsible party has to pay is the subject of expensive study, negotiation and litigation. The retroactive nature of the Superfund program means that financial liability for a site clean up can be assigned today for past waste disposal activities that were permitted at the time they took place.

15. No fewer than 12 old landfill sites in Oneida and Herkimer Counties have been classified as State and/or Federal inactive hazardous waste sites. Based on completed and projected work, the cost to remediate these sites in conformance with State and Federal requirements will exceed $74 million.

16. The substantial costs associated with cleaning up these old landfill sites were not included in the tipping fees paid by haulers at the landfill gate. Instead, the costs of

protecting the environment at these sites are being passed on, figuratively if not literally, to the children of those who used these old landfills.

17. This experience illustrates the significant environmental and potential public health problems that have been associated with the improper siting and use of unlined landfills. It also seems apparent that, while it is cheaper in the short run to operate a landfill without a liner and other important environmental safeguards, in the long run the costs to remediate an unlined landfill site will be substantial. And determining who will pay for the environmental clean-up costs -- after such landfills cease operation -- is a difficult, time consuming, litigious and costly undertaking that -- at best -- can only approximate a true allocation of financial responsibility for repairing the environmental damage that was caused by the operation of these unlined landfills.

18. One practical effect of these State and Federal Superfund programs is this -- financial liability for a future landfill clean up should be considered to be a part of every truckload of waste that goes to the landfill site. Moreover, sending waste to a State permitted landfill site is no protection against future clean up liability. Exposure to such liability needs to be carefully assessed on a site specific basis, by examining the environmental safeguards that are in use at (or that are absent from) the landfill site. The site's environmental setting also needs to be evaluated, to determine the potential damages that could result from landfill related pollution. To ignore these environmental lessons of the past would be short-sighted and irresponsible.

Early Efforts to Address the Region's Disposal Problems

19. In response to the environmental problems and health threats identified in the Counties' 1969 study, and as the DEC began to impose more stringent requirements on landfill operations, many of the 44 local dumps were replaced with multi-community "consolidation" landfills.

This was viewed as an interim step toward a regional approach which would be based on resource recovery. These consolidation landfills were run as cooperative ventures by the involved local municipalities, via the formation of special inter-municipal disposal corporations, boards or districts, and included: the German Flatts-Ilion-Mohawk (GFIM) Landfill; the Southwest Oneida County (SWOCO) Landfill serving the Towns of Augusta, Kirkland, Marshall, Sangerfield, Vernon and Verona; and the Northern Oneida County (NOCO) Landfill serving the Towns of Camden, Lee and Vienna.

20. By the early 1970's there were still approximately 20 landfills operating in the Oneida-Herkimer region. Many of these landfills employed trenching and daily cover provisions, which eliminated some of the problems experienced previously. These landfills were not required to be lined, however, and hence did not guard against significant groundwater contamination.

21. Another problem caused by unlined landfills is that the availability of relatively cheap (in the short run) landfill disposal space creates an obstacle which retards the development of new, environmentally sound solid waste management facilities. Since it is cheaper to operate an unlined landfill that does not include important environmental protection measures, the implementation of new environmentally sound solid waste management facilities is stifled because it is more expensive and time consuming to develop and operate a facility in full compliance with more stringent environmental standards. In the absence of equal treatment and enforcement by State regulators, the economic advantage weighs heavily in favor of existing landfills run at less stringent environmental standards.

22. The increased regulatory pressure on the unlined local landfills — to upgrade, close or consolidate — and more environmental awareness on the part of the general public,

led the Oneida County Board of Legislators in 1970 to form the Oneida County Solid Waste Agency. This Agency was a volunteer group of citizens and community leaders, appointed by the Board of Legislators and charged with the responsibility for examining and recommending appropriate solid waste management programs for Oneida County. Several years later, the Oneida County Board of Legislators created the Environmental Management Council, as authorized under Environmental Conservation law, which had a broader charge but also was appointed by the Legislature to provide research, advice and direction on solid waste management issues.

23. During the early 1970's, often in conjunction with the Oneida County Environmental Management Council, the Solid Waste Agency reviewed alternative methods for the environmentally sound, long-term management of solid waste. Alternative recycling and resource recovery projects, including waste-to-energy and refuse derived fuel, were studied and given careful consideration by the public and local officials. Municipalities in the western part of Oneida County (i.e., the Rome area), in particular, requested that the County take the lead in developing a disposal facility or system that would enable the local municipalities to end their involvement with unlined landfills.

24. At this time, the Solid Waste Agency and Environmental Management Council were developing waste reduction and recycling goals, advising the County Legislature, and, with the Legislature's concurrence and direction, establishing the first public solid waste programs in the area including:

- a coordinated schedule of community paper drives working with the municipalities and service clubs;
- a public education program including a multi-media display used at events throughout the region; and

- a program for glass container collection and processing with the Oneida County Association For Retarded Citizens.

National and State Solid Waste Management Policies

25. Communities throughout New York State and the nation were grappling with solid waste issues similar to those facing Oneida and Herkimer Counties. The use of cheap, unlined landfill sites was turning out to be an expensive environmental problem and, in some cases, a public health nightmare. All of the unlined landfills could not, however, be shut down overnight. Solid waste continued to be generated, and in amounts that were increasing from year to year. We still left our garbage out at the curb once or twice each week, it still got picked up, and the garbage hauler still had to find a place that would take it. New disposal facilities had to be developed, to replace the disposal capacity that we were losing as the unlined landfills were being phased out.

26. Developing new disposal facilities was easier-said than done. Love Canal had triggered a heightened awareness among the public concerning disposal sites. Identification of a possible location for a new disposal site made headlines. Nearby residents viewed any such siting proposal as a threat to their health and quality of life. And local officials trying to plan responsibly for their community's solid waste future were faced with a number of difficult decisions. What type of solid waste management facility or program would be most appropriate for the community? What would it cost? How would it be paid for? Who should be responsible for planning it and implementing it? If a new facility was to be developed, where should it be located? What would be the best way to involve the public in the decision making process? What was the best way to address siting controversies and media coverage? And a relatively new question now had to be asked -- how would any such solid waste management proposal

satisfy what seemed to be rapidly changing and increasingly stringent environmental requirements?

27. In 1976, Congress passed the Resource Conservation and Recovery Act (RCRA). RCRA established a firm set of national policies for environmentally sound solid waste management, which guided the development of the State's and Oneida-Herkimer's solid waste management programs, as the following excerpts from RCRA illustrate:

> "The Congress finds with respect to solid waste ... that ... the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies ... " (RCRA Section 1002(a)(4); emphasis added).
>
> "The objectives of this Act [RCRA) are to promote the protection of health and the environment and to conserve valuable material and energy resources by
>
> ... providing technical and financial assistance to State and local governments and interstate agencies for the development of solid waste management plans (including resource recovery and resource conservation systems) which will promote improved solid waste management techniques (including more effective organizational arrangements), new and improved methods of collection, separation, and recovery of solid waste, and the environmentally safe disposal of nonrecoverable residues ..." (RCRA Section 1003(a)(1); emphasis added); and
>
> "...promoting the demonstration, construction, and application of solid waste management, resource recovery, and resource conservation systems which preserve and enhance the quality of air, water, and land resources..." (RCRA Section 1003(a)(10); emphasis added).

... [T]he Governor of each State, after consultation with local elected officials, shall promulgate regulations ... identifying the boundaries of each area within the State which ... is appropriate for carrying out regional solid waste management" (RCRA Section 4006(a); emphasis added). The Authority was created by special State legislation, at the request of local elected officials, to carry out such federally and state authorized regional solid waste management for Oneida and Herkimer counties.

"... [E]ach State [solid waste management] plan must

... identify ... the responsibilities of State, local, and regional authorities in the implementation of the State plan ..." (RCRA Section 4003(a)(1)(A); emphasis added),

"... identify ... the means for coordinating regional planning and implementation under the State plan" (RCRA Section 4003(a)(1)(C); emphasis added),

"... contain requirements that all solid waste (including solid waste-originating in other States, but not including hazardous waste) shall be (A) utilized for resource recovery or (B) disposed of in sanitary landfills ... or otherwise disposed of in an environmentally sound manner" (RCRA Section 4003(a)(2); emphasis added), and

"... provide for such resource conservation or recovery and for the disposal of solid waste in sanitary landfills or any combination of practices so as may be necessary to use or dispose of such waste in a manner that is environmentally sound" (RCRA Section 4003(a)(6); emphasis added).

28. The New York State Legislature has also adopted several laws over the years which express the State's solid waste management policies. The Oneida-Herkimer region's solid waste management programs have been driven by and are in furtherance of the State's solid waste management policies, as the following excerpts from recent State laws illustrate:

> "A state-local partnership, in which the basic responsibility for the planning and operation of solid waste management facilities remains with local governments and the state provides necessary guidance and assistance, must be forged" (Environmental Conservation Law Section 270106(2); emphasis added).
>
> "The [New York state] legislature finds and declares that the proper management of solid waste is necessary to protect public health and the environment. Toward this end, it is necessary to reduce the generation of solid waste, to accelerate the recovery and reuse of secondary materials within the state, to encourage the conservation of resources, to foster public and private initiatives to achieve these ends, and to encourage a new ethic among New York's citizens to conserve and reuse, rather than discard, useful materials. A state-local partnership is essential to achieving these ends" (Section 2 of the Solid Waste Management Act of 1988, L.1988, c.70; emphasis added).
>
> "The [New York state] legislature also finds that many communities face a crisis in development and implementation of environmentally acceptable ways to dispose of the waste produced by their residents and the industries located within their jurisdictions. This crisis demonstrates the need to facilitate planning for and the development of local solid

> waste management programs, to provide additional state technical assistance, and to enhance state programs relating to solid waste management. State assistance in these areas is needed to assist localities which must assess solid waste management alternatives, work with concerned interests and the public in evaluating these alternatives, and design and implement solid waste management programs" (Section 2 of the Solid Waste Management Act of 1988, L.1988, c.70; emphasis added).

"The following are the solid waste management priorities in this state:

> (a) first, to reduce the amount of solid waste generated;
>
> (b) second, to reuse material for the purpose for which it was originally intended or to recycle material that cannot be reused;
>
> (c) third, to recover, in an environmentally acceptable manner, energy from solid waste that can not be economically and technically reused or recycled; and
>
> (d) fourth, to dispose of solid waste that is not being reused, recycled or from which energy is not being recovered, by land burial or other methods approved by the department [of environmental conservation]." (Environmental Conservation Law Section 27-0106(1)).

The Oneida County Energy Recovery Facility

29. In the mid 1970's, as a result of requests from municipalities in the greater Rome area of Oneida County, plus after considerable study, including analyses of potential markets and alternative technologies, development of a waste-to-energy project was pursued by the County. In 1979, Griffiss Air Force Base approved the essential steam

purchase contract for a County sponsored waste-to-energy facility. Revenues from the sale of steam to Griffiss Air Force Base were critical to such a project, since steam sale revenues would partially offset the costs of running such a facility and would thereby lower the tipping fees to be charged facility users.

30. An adequate supply of solid waste was also vitally important to the proposed waste-to-energy project, since the waste represented the fuel supply needed to produce the steam that would be sold to Griffiss Air Force Base. In 1980, the County signed waste supply contracts with the City of Rome, Griffiss Air Force Base, the Town of Floyd Refuse and Garbage District, the NOCO Landfill Board and the SWOCO Refuse Disposal Corporation. These contracts included commitments to deliver waste suitable for incineration to the County's waste-to-energy facility, but also explicitly provided that local recycling activities would not be precluded by such waste supply commitments. Similar waste supply contracts were also ultimately signed between the County and numerous private haulers including plaintiffs Bliss and Bristol.

31. With the steam purchase and waste supply contracts in place, in 1981 Oneida County undertook the environmental analyses and facility design work needed to obtain facility construction and operation permits from the New York State Department of Environmental Conservation (DEC). Upon completion of the rigorous, costly and time consuming environmental review process, the 200 ton per day Oneida County Energy Recovery Facility was built -- along with a lined ash landfill facility that would provide for the environmentally sound disposal of the facility's incinerator ash residue -- and began operating in January, 1985.

32. Implementation of the Energy Recovery Facility was a significant improvement to the region's public

environmental infrastructure. It provided an environmentally sound, local disposal service to approximately 110,000 people in western Oneida County, including the City of Rome. It replaced local, unlined landfills with a modern incineration facility that utilized a specially constructed lined landfill for ash disposal. Its development was in response to the need expressed by local municipalities to avoid the unaffordable upgrading of their unlined landfills, as would be required pursuant to DEC order for their landfills to remain in operation.

33. The Energy Recovery Facility (ERF) represented an important phase in a staged, comprehensive process to develop a public system based on resource recovery and reduction of dependance on landfill disposal. Importantly, the ERF was a step in a process; it allowed for the closure of many unlined landfills and a consolidation of services; it was designed to be flexible so that adjustments could be made to new developments; the general obligation bonds were for 10 years. The ERF met an important need for its planned life of 10 years, and now the region has developed and is developing new programs and facilities to provide for the next phase of service for the two-county region.

Why The Authority Was Created

34. During the 1980's, increasingly stringent environmental regulations continued to cause the shutdown of the local, unlined landfills that had traditionally been utilized. The 1986 Long Range Alternatives Solid Waste Management Study reported a total of only 8 landfills operating in the two-county region, including the lined ash landfill that was a part of the County's Energy Recovery Facility project. Included in this number were four small, part-time Town landfill sites which only provided service for their communities (i.e., the Town of Annsville, Town of Ohio, Town of Salisbury and the Town of Webb Landfills), plus the somewhat larger Town of Whitestown Landfill. Two

privately owned landfills were also in operation at that time — the Ludlow Sand and Gravel Landfill located in the Town of Paris and the Waste Management Landfill located in the Town of Frankfort. Except for the County's lined ash landfill, all of the landfills operating in the region as of mid-1986 were unlined facilities that presented groundwater contamination concerns.

35. Because the Energy Recovery Facility project only served a portion of Oneida County, and in recognition of the inadequacy of the unlined landfills, the 1986 study recommended that Oneida and Herkimer Counties jointly sponsor the development of an environmentally sound project that would address their long-term solid waste management needs. The public had developed a growing and strong interest in the problems of solid waste management. Throughout the process of planning and developing solid waste management solutions, the public let their concerns be known at every meeting and forum. The public then and now wants to make sure their homes and families are protected from pollution. By the mid 1980's they were demanding that we recover valuable resources from the waste stream before we send what cannot be recovered to a landfill. There was a recognition by the public and local elected officials (towns, villages, cities) that the steps taken by the County to build the ERF were a necessary consolidation of services. There was a further public recognition that a coordinated regional approach would be necessary to plan and develop a full service system that would offer recycling and safe disposal for all the area. To facilitate the development of these needed improvements to the region's environmental infrastructure, the County legislative bodies asked the State Legislature to create the Oneida-Herkimer Solid Waste Management Authority.

36. The Authority is developing an important part of the region's infrastructure. A public solid waste management system is just as important as a region's water and

wastewater treatment systems. If there cannot be some public oversight and control of the solid waste collection system, it is akin to having a public water supply reservoir or a wastewater treatment plant without the pipes.

The Haulers Should Not Be Allowed To Use An Unlined Landfill

37. Since its inception, the Authority has continued to pursue the development of environmentally responsible solutions in response to the needs of the Counties, local municipalities, residents and businesses. The Authority is also currently facing some of the same problems encountered by Oneida County during the late 1970's and early 1980's -- specifically, the difficulty of developing an environmentally sound solid waste management system that is threatened by economic competition from an unlined landfill facility. Residents and businesses of the two-county region are already burdened with the prospect of paying at least $74 million to clean up unlined landfill sites that operated in Oneida and Herkimer Counties. The Authority's efforts to be environmentally responsible, and to avoid the risk of adding to this costly $74 million clean-up bill, represent an essential government service that is for the long-term benefit of this region's health and future growth. The haulers' use of the unlined Seneca Meadows landfill facility and other unlined landfills is environmentally unconscionable, it imperils the Authority's ability to carry out important public services, and the use of such environmentally inferior landfill sites should not be allowed.

The Solid Waste Management System Is Critical Public Infrastructure

38. The development of a solid waste system, especially siting new facilities, takes many years. Although collection of waste is important, it is much easier to respond quickly to a collection problem than it is to develop the system of facilities to process the waste. And this two-county area has

made a series of decisions and commitments to the development of a public system to serve the region for the long-term. Based on my 25 years of involvement in planning and developing the public utility infrastructure to serve the region, these actions, decisions, and commitments, made on the public's behalf, are absolutely essential to the health, safety, welfare and viability of Oneida and Herkimer Counties.

39. This statement is a general review of my involvement and my responsibilities with solid waste management. The statements contained in this affidavit are true to the best of my personal knowledge and belief. Documentation for the statements contained herein exists in the files of the various municipalities of the Counties, in the records of the State of New York, can be confirmed and elaborated upon by expert testimony, or is known to the plaintiffs. A fuller presentation of the evidence contained herein was not possible, despite the efforts of the defendants, due to the shortness of time afforded since the filing of the Complaint and this motion. The following is a partial list of reports, laws, regulations and documents which serve as the basis of this affidavit:

1. Part 19, New York State Sanitary Code, 1966.

2. Memorandum from Herkimer-Oneida Counties Planning Staff to Municipalities, "The Control of Dumps and Refuse Disposal", 12/16/66.

3. Comprehensive Solid Waste Planning Study, Malcolm Pernie Engineers, for Herkimer-Oneida Counties Comprehensive Planning Program, 1969.

4. Solid Waste Disposal Act, 1965.

5. National Environmental Policy Act, 1969.

6. Resource Recovery Act, 1970.

7. New York State Environmental Quality Bond Act, 1972.

8. Comprehensive Environmental Response, Compensation and Liability Act, 1980.

9. New York State Environmental Conservation Law, 1979 amendments.

10. New York State Environmental Conservation Law, 1982 amendments.

11. Oneida County Solid Waste Agency, Studies conducted in early 1970's on alternative methods for the environmentally sound, long term management of solid waste.

12. Resource Conservation and Recovery Act, 1976.

13. New York State Solid Waste Management Act, 1988.

14. Energy Recovery Facility Waste Supply Contracts.

15. Documents pertaining to the planning, design and construction of the Energy Recovery Facility.

16. Long Range Alternatives Study, Eastern Oneida and Herkimer Counties, Barton & Loguidice, P.C., for the Oneida-Herkimer Counties Solid Waste Study Committee, the Oneida County Executive and Legislature, the Herkimer County Legislature, 1986.

WHEREFORE your affiant respectfully requests that this court deny the motion of the plaintiffs for summary judgment, afford the defendants additional time to conduct discovery and to prepare and present additional evidence relating to the claims made in the complaint, and otherwise issue such order and grant such relief as may be just and proper.

Sworn to before me

this 6th day of July, 1995.

/s/ Michael A. Gapin
Michael A. Gapin

/s/ Sandra E. Stevener

Sandra E. Stevener
Notary Publ. NY State
County of Oneida
My Commission Expires 2-18-96

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW, YORK

[TITLE OMITTED IN PRINTING]

STATE OF NEW YORK)
) ss:
COUNTY OF HERKIMER)

AFFIDAVIT

RONALD N. SOLTYS, being duly sworn deposes and says:

1. I reside in Old Forge, New York and I am Chairman of the Herkimer County Legislature. I have served continuously on the Legislature from January, 1980 through the present and have been Chairman since January 1, 1990.

2. Managing solid waste in a safe and cost effective way has become increasingly important to the residents of Herkimer County and the County Legislators. Although we weren't aware of it at the time, the unlined dumps we used to use have created some serious problems. In our area, landfills like Rose Valley in the Town of Newport created a lot of concern when it was open and continues to be controversial even today. There are people living close to the Landfill and the Poland Central School is in close proximity as well. Our legislators are often confronted with concerns about contaminated groundwater and a high incidence of cancer, particularly in children, in people Living near the landfill.

3. Several of our towns and villages worked together to build the German Flatts, Ilion, Mohawk, (GFIM) landfill in the early 1970's. Even though that represented state-of-the-

art technology, it didn't prove to adequately protect groundwater. Now residents of those towns and villages are paying for the clean-up costs for a landfill that was permitted by the state.

4. Many of our residents and local governments were also part of the Ludlow lawsuit. Again, even though towns and villages thought they were complying with the requirements, their waste was taken to the Ludlow Landfill. The long term liability and cost came home to roost and our residents had to pay.

5. I own a business: which I operate out of Herkimer County. Between the business and my responsibility on the Legislature, I travel the roads of Herkimer County all the time. In the past, we've had major problems with people dumping loads of garbage along our roads. Most of our roads are remote because Herkimer is a very rural county. I've seen household garbage, construction debris, roofing waste and all other forms of waste scattered along our roads. On many occasions I've taken it upon myself to pick up the garbage illegally dumped along county roads. Our County Highway Department spends significant time cleaning up garbage along the roads. As I travel the County, I also have seen people burning garbage behind their homes.

6. The County Legislature recognized those problems and the need for public action. Our residents wanted these things to stop and as their elected officials, we developed our local solid waste management laws to reflect that.

7. Before about 1987 there was very little recycling occurring in our County, or anywhere for that matter. As explained by the Program Director for our Herkimer-Oneida Planning Program, Mike Gapin, we were working on a plan with Oneida County to see if a regional project could best serve the public and be the way to start recycling locally. The conclusion of our joint effort was that we should develop a

regional two-county system and that it was necessary to have a strong public role in the system.

8. As one of the first steps in this process, our County Legislature adopted a local waste management law in 1988. We did that to make sure that our residents would have safe, reliable service; that we would develop a system which would avoid the past problems of environmental liability and endless clean-up costs; that we would clamp down on illegal disposal; and that we would develop recycling programs also in response to our public's demands.

9. In 1988, we hired David Lupinski as a Recycling Coordinator for the County. His job was to implement the County law, meet with municipal boards to help set up local separation and recycling systems, develop pilot recycling projects, and develop public education programs. As David developed the recycling system we received extensive and positive feedback from the public. The local law and all the related programs were working toward what the public wanted, and still wants.

10. Our legislature recognized the need for a public solid waste system and we made commitments to do that on the public's behalf.

11. As was recommended in studies done by our planning programs, we asked the state to authorize the creation of a regional unit to manage the solid waste system for the county. When the state acted on our request, we made appointments to the Authority and placed highly qualified individuals on the Board to represent the public's interests.

12. Herkimer County is a huge rural county rich in natural resources. It is 922,880 acres in size. This size also presents some problems like the roadside dumping. As we looked to the best way to fund our solid waste management system, considering the size and character of our County in undeveloped land, we couldn't justify paying for solid waste

through the county real property tax levy. Most of our property doesn't generate any waste. It would have been totally unfair to place the cost burden of solid waste on property taxpayers without any relationship to the demand for the service. In addition, we have a significant number of tax exempt properties, about 19%, which would make it even more unfair to fund solid waste through County taxes.

13. We decided that solid waste management services should not be funded through county property taxes but rather should be on a user fee basis. This provides a fairer system that promotes reduction and recycling.

14. The only long-term answer for managing solid waste and to meet the demands and needs of our residents is the development of a public system.

WHEREFORE, your affiant respectfully requests that the plaintiff's motion for summary judgment be denied in its entirety.

/s/ Ronald N. Soltys
RONALD N. SOLTYS

Sworn to before me this
6th day of July, 1995.

/s/ Carole L. LaLonde
Notary Public

CAROLE L. LALONDE
Notary Public, State of New York
Herkimer County
My Commission Expires 7/31/96

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CIVIL JUDGMENT

UNITED HAULERS ASS'N, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., and INGERSOLL PICKUP, INC.,

Plaintiff

vs. 5:95-CV-516 (NAM)

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA AND COUNTY OF HERKIMER,

Defendant

[X] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the Report and Recommendation of Magistrate Judge Peebles has been adopted in its entirety. Defendants' Motion for Summary Judgment is granted and the Complaint is dismissed. Judgment is hereby entered in favor of the defendants and against the plaintiffs.

All of the above pursuant to the Order of the Honorable Judge Norman A. Mordue, dated the 24th day of March, 2005.

MARCH 24, 2005 **LAWRENCE K. BAERMAN**

DATE **CLERK OF THE COURT**

s/
JOANNE BLESKOSKI
DEPUTY CLERK

402

(5)

NOV 2 - 2006
OFFICE OF THE CLERK

No. 05-1345

In the Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., AND INGERSOLL PICKUP INC.

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, AND COUNTY OF HERKIMER

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

EVAN M. TAGER
Counsel of Record
MIRIAM R. NEMETZ
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

This Court held in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 386 (1994), that "a so-called flow control ordinance, which require[d] all solid waste to be processed at a designated transfer station before leaving the municipality," discriminated against interstate commerce and was invalid under the Commerce Clause because it "de-priv[ed] competitors, including out-of-state firms, of access to a local market." This case presents two questions:

1. Whether the virtually *per se* prohibition against "hoard[ing] solid waste" (*id.* at 392) recognized in *Carbone* is inapplicable when the "preferred processing facility" (*ibid.*) is owned by a public entity.

2. Whether, even if viewed as non-discriminatory, the flow-control ordinances at issue here violate the Commerce Clause under the test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

RULE 29.6 STATEMENT

None of petitioners has a parent company and no publicly held company owns 10% or more of the stock of any of the petitioners.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT 2

INTRODUCTION AND SUMMARY OF ARGUMENT 10

ARGUMENT 13

I. THE FLOW-CONTROL PROVISIONS DISCRIMINATE AGAINST INTERSTATE COMMERCE AND CANNOT SURVIVE THE STRICT SCRUTINY APPLICABLE TO DISCRIMINATORY REGULATIONS 13

A. The Flow-Control Provisions Fail Under The Reasoning Of *Carbone*. 13

B. The Public-Private Distinction Adopted By The Court Of Appeals Is Irreconcilable With This Court's Decisions. 19

1. In *Carbone*, the Court implicitly rejected the public-private distinction. 20

2. The public-private distinction rests on an overly narrow reading of this Court's prior Commerce Clause decisions. 26

a. Local processing requirements (export restrictions) 27

b. Limiting interstate sales to state residents (import restrictions) 29

TABLE OF CONTENTS—continued

Page

c. Hoarding resources for local residents 32

3. Governmental entities participating in the market may not employ their regulatory powers to favor their own facilities over out-of-state entities. 33

C. *Stare Decisis* Principles Command Reversal Of The Decision Below....37

II. THE FLOW-CONTROL PROVISIONS FAIL THE *PIKE* TEST 41

A. The Flow-Control Ordinances Impose A Burden On Interstate Commerce That Is Excessive In Comparison To The Local Interests That It Serves....42

B. The Second Circuit's Application Of The *Pike* Test Was Fundamentally Flawed....44

CONCLUSION 50

TABLE OF AUTHORITIES

Page(s)

Cases:

ASARCO, Inc. v. Idaho Tax Comm'n, 458 U.S. 307 (1982) 40

American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266 (1987) 47

Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders, 48 F.3d 701 (3d Cir. 1995) 38

B.F. Goodrich Co. v. Murtha, 958 F.2d 1192 (2d Cir. 1992) 19

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) 30, 31

Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County, 115 F.3d 1372 (8th Cir. 1997) 37, 39

Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) 47

Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986) 46

Buck v. Kuykendall, 267 U.S. 307 (1925) 14, 15

C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) ..... *passim*

California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905) 48

Chemical Waste Mgmt., Inc. v. Hunt, 504 U.S. 334 (1992) 13

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 2, 13, 32, 33

Coastal Carting Ltd. v. Broward County, 75 F. Supp. 2d 1350 (S.D. Fla. 1999) 37

TABLE OF AUTHORITIES—continued

Page(s)

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977) 26

Dean Milk Co. v. City of Madison,
340 U.S. 349 (1951) 29, 30, 31

Edgar v. MITE Corp., 457 U.S. 624 (1982) 46

Empire Sanitary Landfill, Inc. v. Pennsylvania,
684 A.2d 1047 (Pa. 1996) 38

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Res., 504 U.S. 353 (1992) 13, 49

Foster-Fountain Packing Co. v. Hayden,
278 U.S. 1 (1928) 32

Freedom Holdings Inc. v. Spitzer,
357 F.3d 205 (2d Cir. 2004) 45

Gardner v. Michigan, 199 U.S. 325 (1905) 48

H. P. Hood & Sons, Inc. v. Du Mond,
336 U.S. 525 (1949) 32

Harvey & Harvey, Inc. v. County of Chester,
68 F.3d 788 (3d Cir. 1995) 38

Heier's Trucking, Inc. v. Waupaca County,
569 N.W.2d 352 (Wis. Ct. App. 1997) 38

Hughes v. Alexandria Scrap Corp.,
426 U.S. 794 (1976) 23, 27, 32, 36

Hughes v. Oklahoma, 441 U.S. 322 (1979) 33

Huish Detergents, Inc. v. Warren County,
214 F.3d 707 (6th Cir. 2000) 38

Hunt v. Washington State Apple Adver. Comm'n,
432 U.S. 333 (1977) 47

Lemke v. Farmers' Grain Co., 258 U.S. 50 (1922) 49

TABLE OF AUTHORITIES—continued

Page(s)

Nat'l Solid Waste Mgmt. Ass'n. v. Pine Belt Solid Waste Mgmt. Auth., 261 F. Supp. 2d 644 (S.D. Miss. 2003), rev'd in part, dismissed in part, 389 F.3d 491 (5th Cir. 2004), cert. denied, 126 S. Ct. 332 (2005) 38, 40

National Solid Waste Mgmt. Ass'n. v. Daviess County, 434 F.3d 898 (6th Cir. 2006), petition for cert. filed, 75 U.S.L.W. 3106 (June 28, 2006) 24, 25, 35, 36

Nippert v. City of Richmond, 327 U.S. 416 (1946) 47

On the Green Apartments L.L.C. v. City of Tacoma, 241 F.3d 1235 (9th Cir. 2001) 39

Oregon Waste Sys., Inc. v. Dept. of Envt'l Quality, 511 U.S. 93 (1994) 13

Patterson v. McLean Credit Union, 491 U. S. 164 (1989) 40

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) ..... *passim*

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) 26, 40

Randy's Sanitation, Inc. v. Wright County, 65 F. Supp. 2d 1017 (D. Minn. 1999) 39

Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978) 42, 47

Reeves, Inc. v. Stake, 447 U.S. 429 (1980) 34, 37

South Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984) ..... *passim*

Southcentral Pa. Waste Haulers Ass'n v. Bedford-Fulton-Huntingdon Solid Waste Auth., 877 F. Supp. 935 (M.D. Pa. 1994) 38

TABLE OF AUTHORITIES—continued

Page(s)

Southern Pac. Co. v. Arizona ex rel. Sullivan, 325 U.S. 761 (1945) 47

State of Minnesota v. Barber, 36 U.S. 313 (1890) 24, 30, 31, 32

SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2d Cir. 1995) 6, 37

Toomer v. Witsell, 334 U.S. 385 (1948) 27, 28

Trinova Corp. v. Michigan Dep't of Treasury, 498 U.S. 358 (1991) 26

U & I Sanitation v. City of Columbus, 205 F.3d 1063 (8th Cir. 2000) 37

United States v. Tucker Truck Lines, 344 U.S. 33 (1952) 49

Vince Refuse Serv., Inc. v. Clark County Solid Waste Mgmt. Dist., 1995 WL 253121 (S.D. Ohio Mar. 7, 1995) 39

Walters v. Churchill, 511 U.S. 661 (1994) 49

Waste Mgmt., Inc. v. Metropolitan Gov't, 130 F.3d 731 (6th Cir. 1997) 38

Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth., 814 F. Supp. 1566 (M.D. Ala. 1993), aff'd per curiam, 29 F.3d 641 (11th Cir. 1994) 38

Waste Sys. Corp. v. County of Martin, 985 F.2d 1381 (8th Cir. 1993) 38

West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994) 26, 29, 31

Zenith/Kremer Waste Sys., Inc. v. Western Lake Superior Sanitary Dist., 1996 WL 612465 (D. Minn. July 2, 1996) 37

TABLE OF AUTHORITIES—continued

Page(s)

Constitution and Statutes:

42 U.S.C. § 1983 6

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1292(a)(1) 7

Civil Rights Act of 1991, P.L. 102-166 § 101 40

Interstate Transportation of Municipal Solid Waste Act of 1995, S. 534, 104th Cong., 1st Sess. (1995) 40

Legislative Status Report, THE BOND BUYER, Nov. 12, 1997 41

Solid Waste Disposal Act, H.R. 4683, 103d Cong., 2d Sess. (1994) 41

S. Rep. 104-52 (1995) 41

U.S. Const. art. 1, § 8 2

Miscellaneous:

Martha M. Canan, *PSA Lobbying Congress to Give Municipalities Control Over Local Garbage Flow*, THE BOND BUYER, May 18, 1994 41

RICHARD C. PORTER, THE ECONOMICS OF WASTE 112 (2002) 18, 32, 39

United States Environmental Protection Agency, Report to Congress: *Flow Controls and Municipal Solid Waste* II-1 to II-5 (Mar. 1995), *available at* http://www.epa.gov/epaoswer/nonhw/muncpl/flowctrl/report chpt-ii.pdf 39

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinions of the court of appeals are reported at 261 F.3d 245 (*"United Haulers I"*) (Pet. App. 22a-53a) and 438 F.3d 150 (*"United Haulers II"*) (Pet. App. 1a-21a). The decisions of the United States District Court for the Northern District of New York initially granting summary judgment in favor of plaintiffs (Pet. App. 103a-117a) and, following remand, granting summary judgment in favor of defendants (Pet. App. 54a-74a) are unreported. The Report and Recommendation of the United States Magistrate Judge (Pet. App. 75a-102a) is unreported.

JURISDICTION

The judgment of the Second Circuit was entered on February 16, 2006. A timely petition for certiorari was filed on April 1, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 2(d) of Oneida County Board of Legislators Resolution No. 301 provides in relevant part:

> From the time of placement of solid waste and of recyclables at the roadside or other designated area approved by the County, or by the [Oneida-Herkimer Solid Waste Management] Authority pursuant to contract with the County, or by a person for collection in accordance herewith, such solid waste and recyclables shall be delivered to the appropriate facility, entity or person responsible for disposition designated by the County or by the Authority pursuant to contract with the Authority.

Resolution No. 301 is set forth in full at Pet. App. 118a-130a.

Section 2(c) of Herkimer County Local Law, Introductory No. 1 - 1990, provides in relevant part:

> After placement of garbage and of recyclable materials at the roadside or other designated area approved by the Legislature by a person for collection in accordance herewith, such garbage and recyclable material shall be delivered to the appropriate facility designated by the Legislature, or by the [Oneida-Herkimer Solid Waste Management] Authority pursuant to contract with the County.

Herkimer County Local Law, Introductory No. 1 - 1990, is set forth in full at Pet. App. 131a-143a.

Article I, Section 8 of the U.S. Constitution provides in relevant part:

> The Congress shall have Power * * * To regulate Commerce * * * among the several States * * *.

STATEMENT

In *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), this Court held that a local ordinance that required all municipal solid waste within the town to be delivered to a transfer station that was built by a private company at the town's instigation and that was to be sold to the town for one dollar after five years violated the Commerce Clause. The facts of the present case are virtually identical, except that the facilities designated to receive waste have been owned from day one by a public entity.

The court of appeals concluded that this distinction made a dispositive difference. It held that there can be no discrimination against interstate commerce when the favored business is publicly owned. Accordingly, it ruled that the flow-control laws were not subject to the "virtually *per se* rule of invalidity" applicable to discriminatory regulations (*City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)), but instead should be evaluated under the balancing test outlined

in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Under the *Pike* test, an evenhanded regulation "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142. On appeal after remand, the court of appeals adopted an idiosyncratic understanding of the *Pike* test, ruling that, because the costs of the flow-control laws "do[] not appear to fall differentially on the shoulders of any identifiable private or governmental entity" (Pet. App. 15a-16a), they imposed, at most, an "insubstantial" burden on interstate commerce (*id.* at 18a) that was easily outweighed by the ostensible benefits of the provisions.

These holdings threaten to render *Carbone* a dead letter, because it is a simple matter for municipalities to structure (or restructure) transactions so that they have record title to the preferred facilities.

The pertinent facts are simple and undisputed.

1. *Waste Collection in Oneida and Herkimer Counties.* Oneida and Herkimer Counties are sparsely populated counties in upstate New York. Historically, collection of trash has been a ***private*** function in these counties. Most local governments in Oneida and Herkimer Counties have never assumed responsibility for trash collection, and residents and businesses in most parts of the Counties must contract with private haulers for the removal of their waste. See J.A. 197a.

2. *The Imposition of Flow Control in Oneida and Herkimer Counties.* In September 1988, at the request of Oneida and Herkimer Counties, the New York State Legislature created the Oneida-Herkimer Solid Waste Management Authority ("the Authority"). Pet. App. 57a-58a, 78a. In May and December 1989, the Authority entered into contracts with the Counties that required the Authority to purchase, operate, construct, and develop facilities for the processing and/or disposal of solid waste and recyclables generated in the Counties. For their part, the Counties agreed to ensure the

delivery of all solid waste generated within their borders to facilities designated by the Authority. *Id.* at 58a, 79a.

In December 1989, Oneida County passed the required flow-control ordinance. The ordinance specifies that all solid waste and recyclables left at curbside must "be delivered to the appropriate facility, entity or person responsible for disposition designated by the County or by the Authority * * *." Pet. App. 122a. Under the ordinance, any hauler handling waste generated in the County must have a valid permit issued by the County or the Authority (*id.* at 127a) and must deliver all construction debris, green waste, commercial and industrial waste, curbside recyclables, major appliances and tires, household hazardous waste, and infectious waste to designated facilities (*id.* at 122a, 124a-127a). Penalties for noncompliance include permit revocation, fines, and imprisonment. *Id.* at 129a-130a. Herkimer County enacted an almost identical flow-control ordinance in February 1990. *Id.* at 131a-143a.

The Authority's Solid Waste Plan expressly contemplates "the development of a new long-term landfill site to accommodate the non recyclable portion of the waste stream" of the two Counties. J.A. 166a. Pending development of its own landfill, however, the Authority needed to construct a local transfer station to store, transfer, and consolidate municipal solid waste. In June 1991, the Authority contracted with a private entity (Empire Sanitary Landfill of Taylor, Pennsylvania ("Empire")) for the design, construction, and operation of a transfer station in Utica, Oneida County, with subsequent disposal of the waste in Empire's landfill in Pennsylvania. Pet. App. 27a-28a.[1] The contract required the

---

[1] After the agreement with Empire expired in 1998, Waste Management of New York was selected to operate the transfer station. See J.A. 176a-190a. Under that contract, waste is transported to a landfill in Fairport, New York. See *id.* at 177a.

Authority to divert all solid waste generated in the Counties (except recyclables and waste burned at the Authority's incinerator) to the Utica Transfer Station. J.A. 74a, 85a. Consistent with this agreement, the Authority's Rules and Regulations expressly require haulers to "deliver all acceptable solid waste and curbside collected recyclables generated within Oneida and Herkimer Counties to an Authority designated facility." Pet App. 28a; J.A. 277a.

When this action commenced in 1995, the Authority had designated five Authority-owned facilities for the processing and/or disposal of solid waste and recyclables generated in the Counties—an incinerator, a recycling center, an ash landfill, a green waste compost facility, and the Utica Transfer Station. J.A. 285a-286a.[2] At that time, the monopolistic tipping fee at the transfer station was $86 per ton. Pet. App. 107a; J.A. 282a. As the Second Circuit recognized, "[e]ven the lowest tipping fee charged under the Counties' scheme is higher than the market value for the disposal services the Authority provides." Pet. App. 29a. Indeed, petitioners submitted evidence that, if permitted to do so, they could dispose of waste they collect in Oneida and Herkimer Counties at out-of-state facilities for as little as $26 per ton. J.A. 292a, 294a; see also *id.* at 257a, 267a-268a ($37 per ton to $55 per ton, including transportation); *id.* at 272a ($39.20 per ton, including transportation, for construction and demolition waste).

The flow-control provisions direct more than 200,000 tons of solid waste per year to the County-designated facilities (J.A. 197a), generating revenues of more than $16 million for the Authority annually. See *id.* at 174a.

---

[2] Subsequently, the Authority designated two additional transfer stations, a stump disposal facility, and a household hazardous waste facility. See J.A. 175a.

3. *The Complaint and the Initial Grant of Summary Judgment to Plaintiffs.* In April 1995, petitioners—six haulers that operated in Oneida and Herkimer Counties and a trade association—filed suit against the Authority and both Counties, alleging that the flow-control ordinances and the Authority's Rules and Regulations (collectively "the flow-control laws") violate the dormant Commerce Clause and that, in enforcing those laws, defendants deprived them of their constitutional rights in violation of 42 U.S.C. § 1983. On March 31, 2000, the district court granted plaintiffs' motion for summary judgment, concluding that the flow-control laws violated the dormant Commerce Clause.

The district court found the unconstitutionality of the flow-control laws to be conclusively established by *Carbone*. It explained:

> These flow control laws are virtually indistinguishable from the laws examined and struck down in both *Carbone* and *SSC Corp.* [*v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995)]. * * * Courts have considered it almost a foregone conclusion that flow control laws violate the dormant commerce clause. * * * I accordingly conclude that the flow control laws in Oneida and Herkimer counties also violate the dormant commerce clause. The laws are discriminatory and *per se* invalid.

Pet. App. 111a.

The court rejected defendants' contention that the challenged laws could be distinguished on the ground that they constitute "an inextricable part of a public waste management system for the local management of local waste," stating: "[T]he relevant case law consistently has extracted flow control laws as an improper element of general waste management schemes." *Id.* at 113a. And in response to defendants' argument that "they merely have restructured the private col-

lection market and prohibited haulers from crossing over into the disposal market," the district court explained:

> [T]he flow control laws dictate where the haulers must bring local solid waste and at what price. Although defendants contend repeatedly that their system treats all parties alike with respect to disposal services, what they actually are doing is hoarding all local solid waste for the benefit of a preferred local disposal facility.

Id. at 113a-114a.

Having found the flow-control laws unconstitutional, the district court enjoined their enforcement and referred the matter to the magistrate judge for determination of damages. *Id.* at 116a-117a. Defendants appealed under 28 U.S.C. § 1292(a)(1).

4. *The First Appeal: United Haulers I.* The Second Circuit reversed. It concluded that "the district court erred in its Commerce Clause analysis by failing to recognize the distinction between private and public ownership of the favored facility" (Pet. App. 39a) and held that "a municipal flow control law does not discriminate against out-of-state interests in violation of the Commerce Clause when it directs all waste to publicly owned facilities" (*id.* at 40a).

The court professed uncertainty as to whether this Court had accepted or rejected the "public-private distinction" in *Carbone*, stating that the majority's "language can fairly be described as elusive on that point." Pet. App. 45a. But it found "precedential support" (*id.* at 50a) for such a distinction in the "local processing cases" upon which the Court relied in *Carbone*. Noting that in each case the favored businesses were private entities (*id.* at 45a), it reasoned that "[t]he common thread in the Court's dormant Commerce Clause jurisprudence * * * is that a local law discriminates against interstate commerce when it hoards local resources *in a manner* that favors local business, industry or investment

over out-of-state competition" (*id.* at 47a (emphasis in original)). Relying on Justice Souter's dissent in *Carbone*, the court found there to be "sound reason for the Court's consistent, although often unstated, recognition of the distinction between public and private ownership of favored facilities," namely that "'[r]easons other than economic protectionism are * * * more likely to explain the design and effect of an ordinance that favors a public facility.'" *Ibid.* (quoting *Carbone*, 511 U.S. at 421 (Souter, J., dissenting)).

The Second Circuit accordingly held that the district court erred in applying the strict level of scrutiny applicable to discriminatory legislation and instead should have applied the more lenient balancing test articulated in *Pike*. Although admitting that it was tempted to apply *Pike* itself (and presumably uphold the laws under it), the court satisfied itself with remanding the case to the district court with a very strong hint as to how to rule. See Pet. App. 52a. The plaintiffs filed a petition for a writ of certiorari, which was denied. 534 U.S. 1082 (2002).

5. *District Court Proceedings on Remand.* Upon remand, the parties conducted discovery and then filed cross-motions for summary judgment. Dkt. Nos. 145, 152, 160. The magistrate judge recommended granting summary judgment in favor of defendants. Pet. App. 101a-102a.

According to the Report and Recommendation of the magistrate judge, the flow-control laws do not impose ***any*** burden on interstate commerce that is cognizable under the *Pike* test. Pet. App. 99a. In the view of the magistrate judge, "[t]he critical inquiry" under *Pike* "is whether an out-of-state business is treated less favorably than one similarly situated but within the state." *Id.* at 95a. Because the Counties' flow-control laws treat "a local private trash business * * * no differently * * * than one situated out of state" (*id.* at 96a), the magistrate judge concluded that there was no need to "pro-

ceed to the next step of balancing the burdens against the putative benefits associated with the legislation." *Id.* at 99a.

Over plaintiffs' objections, the district court adopted the Report and Recommendation in its entirety. Pet. App. 74a. The district court stated:

> [P]laintiffs here have not and cannot identify "**any** in-state commercial interest that is favored, directly or indirectly," by the waste management legislation enacted by defendants at the expense of out-of-state competitors. In the absence of evidence that the flow control laws impacted interstate commerce differently than intrastate commerce, there were no detrimental "effects" to weigh against the putative benefits of the legislation. Thus, it was not error, as plaintiffs contend, for the Magistrate Judge to decline to engage in the second part of the *Pike* balancing test by weighing non-existent burdens against obvious benefits.

Id. at 70a (emphasis in original; citations omitted); see also *id.* at 67a (there could be no violation of the Commerce Clause where there was "no distinction in the treatment of in-state versus out-of-state businesses"). The district court dismissed the complaint, and plaintiffs appealed.

6. *The Second Appeal: United Haulers II.* The Second Circuit affirmed. The court acknowledged that the Authority had "employed its regulatory powers to compel delivery of the waste generated within the Counties to its processing facility." Pet. App. 12a. The court further recognized that the regulations "impose a type of export barrier on the Counties' unprocessed waste" in that they have "the direct and clearly intended effect of prohibiting articles of commerce generated within the Counties from crossing intrastate and interstate lines." *Id.* at 13a. Thus, the court conceded, the Counties' flow-control laws have "removed the waste generated in Oneida and Herkimer Counties from the national market-

place for waste processing services, a result which traditionally has been thought to implicate a central purpose of the Commerce Clause." *Id.* at 15a.

The court was reluctant, however, to conclude that this trade barrier imposed "a differential burden triggering the need for *Pike* analysis." Pet. App. 16a. It explained: "[W]e think the courts have safeguarded the ability of commercial goods to cross state lines primarily as a means to protect the right of businesses to compete on equal footing wherever they choose to operate" and to enable "states and municipalities to exercise their police powers without undue interference from the laws of neighboring jurisdictions." *Id.* at 18a. Because the Counties' waste export ban did not, in its view, implicate these concerns, the court found it to be unclear whether the flow-control laws imposed ***any*** cognizable burden on interstate commerce.

The court ultimately declined to decide whether the flow-control laws impose a burden cognizable under *Pike*. Pet. App. 16a. Instead, it held that any such burden was so "insubstantial" or "slight" (*id.* at 18a) that it would be outweighed by even a "minimal showing of local benefit" (*ibid.*). But the court made clear that, in assessing the "*degree* to which [the provisions] might burden interstate commerce" (*ibid.* (emphasis in original)), it found it "critical" (*ibid.*) that "the purported differential burden does not appear to fall differentially on the shoulders of any identifiable private or governmental entity" (*id.* at 15a-16a). Concluding that the benefits of the flow-control laws "easily clear" the low hurdle it had just established for them, the court held that the provisions satisfy the *Pike* test. *Id.* at 18a.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Carbone*, this Court recognized that flow-control provisions erect overt barriers to interstate trade that implicate the core purposes of the dormant Commerce Clause, and, accordingly, ruled that such measures are subject to the most

stringent level of scrutiny. The Second Circuit now has held that, when public entities hold title to the designated facilities, flow-control provisions are not subject to virtually *per se* invalidation but instead impose such an "insubstantial" burden on interstate commerce that they will be upheld upon even a "minimal" showing of local benefit.

Under the long-established principles that underlie *Carbone*, however, the flow-control provisions at issue here violate the Commerce Clause. This Court held in *Carbone* that Clarkstown's virtually identical flow-control ordinance discriminated against interstate commerce because, like other local processing requirements that the Court has invalidated, it hoarded demand for the benefit of an in-state facility and precluded out-of-state competition. The ordinances here have precisely the same protectionist effect: They force commercial haulers to purchase waste processing and disposal services from in-state facilities, barring patronage of out-of-state facilities that offer those services at lower prices.

Like the ordinance in *Carbone*, moreover, the flow-control measures here are principally a financing mechanism: They allow respondents to use monopolistic tipping fees, rather than tax dollars, to fund their facilities. Because respondents can advance their financial and other goals without erecting regulatory barriers to interstate trade, the flow-control measures fail strict scrutiny.

The Second Circuit's view that flow-control provisions are exempt from strict scrutiny when they favor publicly owned facilities is irreconcilable with *Carbone*. Clarkstown's transfer station was public in all but the most formal sense; the flow-control ordinance served the public purpose of allowing the Town to obtain title to the facility at nominal cost without investing tax dollars. While fully aware of those facts, the Court decided that the flow-control provision impermissibly discriminated against interstate commerce—implicitly rejecting Justice Souter's dissenting view that the

facility's public character precluded a finding of discrimination. Given this Court's renunciation of formalistic distinctions in its Commerce Clause decisions, it is implausible that it would have decided the case differently had Clarkstown already held title to its transfer station.

In fact, the public-private distinction adopted below rests on an overly narrow understanding of the forms of discrimination that trigger strict scrutiny. In the Second Circuit's view, respondents' ordinances do not discriminate because they do not give in-state private industry an advantage over out-of-state competitors. But this Court has frequently held that state and local laws are protectionist for other reasons—when, for example, they require the local performance of operations that could be performed elsewhere, prevent out-of-state sellers from competing for in-state business, or hoard articles of commerce for the benefit of state residents.

The flow-control ordinances here possess all of these protectionist characteristics. Contrary to the Second Circuit's view, moreover, they clearly benefit a local proprietor—*i.e.*, respondents themselves, who should not be allowed to use their regulatory powers to shield their market activities from interstate competition.

Because the flow-control provisions represent classic protectionism, they should be subject to strict scrutiny. But even if the public ownership of the designated facilities renders the ordinances non-discriminatory, they nonetheless should be held invalid under the *Pike* test. As the Second Circuit acknowledged, the flow-control measures have "the direct and clearly intended effect of prohibiting articles of commerce generated within the Counties from crossing * * * interstate lines." Pet. App. at 13a. The provisions thus impose a severe burden on interstate commerce that is clearly excessive in comparison to the interests that they serve.

Indeed, as Justice O'Connor observed in *Carbone*, the widespread adoption of similar measures by other localities

would destroy the vibrant interstate waste market and lead to Balkanization of the sort that the Founders intended to avoid. Because the flow-control ordinances are clearly unconstitutional, the decision below should be reversed.

ARGUMENT

I. THE FLOW-CONTROL PROVISIONS DISCRIMINATE AGAINST INTERSTATE COMMERCE AND CANNOT SURVIVE THE STRICT SCRUTINY APPLICABLE TO DISCRIMINATORY REGULATIONS

A. The Flow-Control Provisions Fail Under The Reasoning Of *Carbone*.

In *Carbone*, this Court held that "well-settled principles of our Commerce Clause jurisprudence" required invalidation of a flow-control ordinance adopted by the Town of Clarkstown. 511 U.S. at 386. *Carbone* was one of a long line of decisions holding that the Commerce Clause protects interstate commerce in waste from state or local restriction. See *City of Philadelphia*, 437 U.S. 617; *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Res.*, 504 U.S. 353 (1992); *Oregon Waste Sys., Inc. v. Dept. of Envt'l Quality*, 511 U.S. 93 (1994). The bedrock principles underlying *Carbone* compel the conclusion that respondents' flow-control ordinances are unconstitutional.

Clarkstown's ordinance required that all solid waste generated within the town's borders be brought for processing to the transfer station designated by the town. The transfer station was constructed by a private entity, which, by agreement with the town, was to operate the facility for five years, whereupon the town was to purchase the facility for one dollar. 511 U.S. at 387. The town guaranteed that the facility would receive a minimum of 120,000 tons of waste annually and authorized the contractor to charge a tipping fee of $81 per ton, a rate that exceeded the market rate. *Ibid.* "The ob-

ject of this arrangement was to amortize the cost of the transfer station: The town would finance its new facility with the income generated by the tipping fees." *Ibid.*

This Court held that, because the ordinance "depriv[es] competitors, including out-of-state firms, of access to a local market, * * * the flow control ordinance violates the Commerce Clause." *Id.* at 386. The Court pointed out that "what makes garbage a profitable business is not its own worth but the fact that the possessor must pay to get rid of it. In other words, the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it." *Id.* at 390-391. "With respect to this stream of commerce, the flow control ordinance discriminates," the Court explained, "for it allows only the favored operator to process waste that is within the limits of the town." *Id.* at 391.

The Court's reasoning was firmly and explicitly rooted in its prior Commerce Clause decisions. First, the Court explained that the challenged flow-control ordinance was "just one more instance of local processing requirements that we long have held invalid." *Ibid.* It stated:

> The essential vice in laws of this sort is that they bar the import of the processing service. * * * The flow control ordinance has the same design and effect. It hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility. * * * The flow control ordinance at issue here squelches competition in the waste-processing service altogether, leaving no room for investment from outside.

Id. at 392.

Second, the Court found the ordinance to be "not far different from" (*id.* at 394) the state law invalidated in *Buck v. Kuykendall*, 267 U.S. 307 (1925). That law prohibited common carriers from operating on interstate routes without a certificate of public necessity and convenience; such a cer-

tificate had been denied to the petitioner on the ground that other carriers adequately served the routes in question. Because the provision constituted a "prohibition of competition" in interstate commerce (*Buck*, 267 U.S. at 315 (quoted in *Carbone*, 511 U.S. at 394)), the Court concluded that it was unconstitutional. The Court stated: "Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the commerce clause." *Buck*, 267 U.S. at 316.

Having found that Clarkstown's ordinance discriminated against interstate commerce, the Court next examined whether the provision could satisfy the stringent standard applicable to discriminatory measures. The Court explained that the flow-control ordinance would be upheld only if it was among "the narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate state interest." 511 U.S. at 392. The Court noted that Clarkstown's attempts to satisfy that demanding standard "must be rejected absent the clearest showing that the unobstructed flow of interstate commerce itself is unable to solve the local problem." *Id.* at 393 (emphasis added).

The Court then rejected the argument that flow control is "necessary to ensure the safe handling and proper treatment of solid waste." *Id.* at 392-93. It explained that "Clarkstown has any number of nondiscriminatory alternatives for addressing the health and environmental problems alleged to justify the ordinance in question." *Id.* at 393. Among other things, "uniform safety regulations enacted without the object to discriminate" could be used to "ensure that competitors like Carbone do not underprice the market by cutting corners on environmental safety." *Ibid.*

The Court next rejected the notion that Clarkstown could "justify the flow control ordinance as a way to steer solid waste away from out-of-town disposal sites that it might

deem harmful to the environment." *Ibid.* According to the Court, "States and localities may not attach restrictions on imports or exports in order to control commerce in other States." *Ibid.*

The Court acknowledged that the flow-control ordinance did serve one "central purpose that a nonprotectionist regulation would not: It ensures that the town-sponsored facility will be profitable, so that the local contractor can build it and Clarkstown can buy it back at nominal cost in five years." *Ibid.* But, the Court explained, "revenue generation is not a local interest that can justify discrimination against interstate commerce." *Ibid.* In response to Clarkstown's argument that "special financing is necessary to ensure the long-term survival of the designated facility" (*id.* at 594), the Court stated:

> [T]he town may subsidize the facility through general taxes or municipal bonds. ***But having elected to use the open market to earn revenues for its project, the town may not employ discriminatory regulation to give that project an advantage over rival businesses from out of State.***

Ibid. (emphasis added; citation omitted).

Like the Town of Clarkstown, respondents here are using their regulatory powers to discriminate against interstate commerce: they are forcing waste haulers that might otherwise do business with out-of-state entities to purchase waste processing and disposal services from an in-state facility. Under *Carbone*, this scheme is unconstitutional.

In fact, the flow-control provisions at issue here—which are virtually identical to the ordinance invalidated in *Carbone*—suffer from exactly the same "essential vice[s]" as Clarkstown's ordinance. *Id.* at 392. First, the ordinances "hoard[] solid waste, and the demand to get rid of it, for the benefit of the preferred facility." *Ibid.* Absent the flow-control provisions, demand for disposal of waste generated in Oneida and Herkimer could contribute to the economic vi-

ability of facilities elsewhere. Instead, as in *Carbone*, municipal authorities are using their regulatory power to monopolize that limited resource for the in-state facilities that they sponsor.

Second, the flow-control provisions "squelch[] competition" by out-of-state facilities. *Ibid.* As in *Carbone*, out-of-state firms are precluded by law from competing for the business of commercial waste haulers that have picked up waste from Clarkstown's residents and businesses. Thus, respondents are doing exactly what this Court has said is forbidden: "us[ing] their regulatory power to favor a local enterprise by prohibiting patronage of out-of-state competitors or their facilities." *Id.* at 394.[3]

As in *Carbone*, moreover, the flow-control provisions cannot be justified by the local interests they ostensibly serve. As the court of appeals explained, the principal purpose of the measures is to "secure the financial viability of the Counties' comprehensive waste management program by ensuring that sufficient waste (with its attendant 'tipping fees') is delivered to the Authorities' facilities." Pet. App. 18a-19a. Even before the flow-control provisions were adopted, proponents acknowledged that "a specific objective was to alleviate the County tax burden" (J.A. 307a) and that

---

[3] A few differences in the ordinances deserve mention. Unlike the Counties' ordinances, Clarkstown's ordinance required waste processed within the Town but generated elsewhere to be delivered to the Town's transfer station. That feature of the ordinance, however, was not indispensable to the majority's decision that the provision discriminated against interstate commerce. In other respects, moreover, respondents' ordinances impose ***greater*** burdens on interstate commerce than Clarkstown's ordinance: Haulers are not permitted (as Carbone was) to sell residential recyclables in interstate commerce (J.A. 96a-97a) and respondents' facilities do not accept out-of-state waste (*id.* at 136a).

"[t]he ability to finance and then operate [the Authority] facilities depends upon the legal commitment of the [Counties'] waste." *Id.* at 311a. Respondents' expert confirmed that "[b]ecause of flow control it is possible for the Authority * * * to impose a fee which is above the marginal cost of disposal," generating "funds that can be utilized to carry out some of the other aspects of the integrated waste management program." Joint Appendix in *United Haulers II*, at A-788.

As the court of appeals acknowledged, however, "revenue generation is not a local interest that can justify discrimination against interstate commerce." Pet. App. 19a (quoting *Carbone*, 511 U.S. at 593). That is a sensible rule because local governments have available many nondiscriminatory methods to finance their activities. Moreover, flow control is a very inefficient financing mechanism: Although flow control allows municipalities to avoid the "political cost" of "making the citizenry explicitly aware of the high cost" of local facilities (RICHARD C. PORTER, THE ECONOMICS OF WASTE 112 (2002)), flow control actually is very costly because it prevents local residents and businesses from seeking less expensive disposal alternatives. Even if local taxes must be increased to support local facilities in the absence of flow control, "the city's residents gain more on the waste disposal side * * * than they lose as city taxpayers." *Id.* at 111.

The court of appeals opined that the flow control measures also serve to encourage recycling and waste volume reduction through differential pricing. Pet. App. 20a. It was undisputed, however, that many municipalities have been equally or more successful in encouraging recycling without using flow control. J.A. 226a, 345a-346a. Even if they could no longer charge monopolistic prices, moreover, respondents could continue to employ differential pricing at their facilities.

Finally, the court of appeals contended that flow control was necessary in order to "direct[] the region's trash to landfill facilities that employ acceptable environmental practices"—thereby "reducing the Counties' exposure to costly environmental tort suits." Pet. App. 20a. This putative justification for flow control is misguided. If a commercial hauler were to pick up waste from a business or residence and then bring it to a processing or disposal facility unconnected with the Counties, respondents never would come into possession of the waste and would not have any liability for it. See *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992) ("a municipality may be liable" for environmental cleanup "if it arranges for the disposal of hazardous substances"). Indeed, if respondents genuinely wanted to minimize exposure to environmental liability, it would be more rational for them to ***encourage*** the use of private waste disposal alternatives. This ostensible rationale for flow control, therefore, simply cannot justify discrimination against interstate commerce.

B. The Public-Private Distinction Adopted By The Court Of Appeals Is Irreconcilable With This Court's Decisions.

The Second Circuit acknowledged that the flow-control ordinances have "the direct and clearly intended effect of prohibiting articles of commerce generated within the Counties from crossing intrastate and interstate lines." Pet. App. 13a. Distinguishing this case from *Carbone*, the court of appeals nevertheless held that "a municipal flow control ordinance does not discriminate against out-of-state interests in violation of the Commerce Clause when it directs all waste to publicly-owned facilities." *Id.* at 40a. As we next discuss, however, the public character of the Counties' facilities is a wholly invalid basis for permitting this acknowledged "export barrier" (*id.* at 13a) to be erected by a local government.

1. In *Carbone*, the Court implicitly rejected the public-private distinction.

The court of appeals believed that *Carbone* left open the question whether flow control favoring a publicly owned facility is permissible. In fact, the majority in *Carbone* invalidated Clarkstown's ordinance while fully aware that the designated facility was essentially public, employing reasoning that was fully applicable to public facilities. Accordingly, the opinion implicitly rejects the distinction relied upon by the court of appeals.

The Court clearly understood that Clarkstown's transfer facility was public in character. As the majority opinion explains, the facility was conceived and constructed under the imprimatur of the municipality: Clarkstown had agreed to close its existing public landfill and build a transfer station on the same site pursuant to a consent decree with the New York State Department of Environmental Conservation. *Carbone*, 511 U.S. at 386-387. Although "a local private contractor agreed to construct the facility and operate it for five years" (*ibid.*), it was understood that after five years the facility would transfer ownership to the town for one dollar. The ordinance itself referred to the facility as though it were already public: It stated that all acceptable waste "is to be transported and delivered to the Town of Clarkstown solid waste facility * * * or to such ***other disposal or recycling facilities operated by the Town of Clarkstown.***" *Id.* at 398 (emphasis added).

Further, the Court understood that the flow-control provision was principally a ***public*** "financing measure": the provision was designed to "ensure[] that the town-sponsored facility will be profitable so that the local contractor can build it and Clarkstown can buy it back at nominal cost in five years." *Id.* at 393. Given these circumstances, it is no wonder that the majority referred to the transfer station as ***the town's*** project. See *id.* at 394 ("[H]aving elected to use the

open market to earn revenues for ***its*** project, the town may not employ discriminatory regulation to give that project an advantage over rival businesses from out of state.") (emphasis added); *id.* at 387 ("The town would finance ***its*** new facility with the income generated by the tipping fees.") (emphasis added).

This language leaves no doubt that the majority viewed the facility as a creature of the town, created and operated in the service of the town's interests. It found the flow-control ordinance to be discriminatory anyway, rejecting Clarkstown's argument that the ordinance was not discriminatory because "the Town is not a 'competitor' receiving an 'advantage'" over out-of-state interests. Brief for Respondents in *C&A Carbone, Inc. v. Town of Clarkstown* (No. 92-1402), 1993 WL 433043, at *13.

The majority issued its decision over a dissent in which Justice Souter (joined by Chief Justice Rehnquist and Justice Blackmun) cited the facility's public character as grounds for upholding the ordinance. In Justice Souter's opinion, there was no discrimination because ***"the one proprietor * * * favored [by the challenged flow control ordinance] is essentially an agent of the municipal government * * *."*** 511 U.S. at 416. The dissenters believed that "[a]ny discrimination worked by [the ordinance] thus fails to produce the sort of entrepreneurial favoritism we have previously defined and condemned as protectionist." *Ibid.* (emphasis added). The dissenters further explained:

> While our previous local processing cases have barred discrimination in markets served by private companies, ***Clarkstown's transfer station is essentially a municipal facility, built and operated under a contract with the municipality and soon to revert entirely to municipal ownership.*** * * * The majority ignores this distinction between public and private enterprise, equating [the ordinance's] "hoard[ing]"

> of solid waste for the municipal transfer station with the design and effect of ordinances that restrict access to local markets for the benefit of local private firms.

Id. at 419-420 (emphasis added; internal quotation marks, citations, and footnote omitted).

The dissenters concluded that the ordinance should be upheld because it "conveys a privilege ***on the municipal government alone***, the only market participant that bears responsibility for ensuring that adequate trash processing services continue to be available to Clarkstown residents." *Id.* at 430 (emphasis added). In departing from this vigorously argued dissent, the majority implicitly rejected the theory that flow-control measures benefiting public facilities are permissible.

In embracing the public-private distinction, the Second Circuit took the position that "the Justices were divided over *the fact of whether* the favored facility was public or private, rather than on the import of that distinction." Pet. App. 44a (emphasis in original). But neither the majority nor the dissenting opinion in *Carbone* (nor Justice O'Connor's concurring opinion, for that matter) contains any hint of such a factual dispute. To the contrary, as discussed above, the majority evidently accepted the dissent's view that, for all practical purposes, the transfer station was "essentially a municipal facility" (511 U.S. at 419)—just like the facilities that benefit from flow control here. That uncontroverted fact did not change the Court's view that the monopoly afforded to the transfer station by the town's regulation was unconstitutional.

Defending its conclusion that the majority was swayed by the ostensibly private nature of Clarkstown's transfer station, the court of appeals noted that "the *Carbone* majority referenced the private character of the favored facilities several times." Pet. App. 44a. In fact, the three cited references

do not have the significance that the lower court attributes to them. In the first one, the Court simply recited the undisputed fact that "[a] local private contractor agreed to construct the facility and operate it for five years." 511 U.S. at 387. In the second and third passages cited by the court of appeals, the Court explained that Clarkstown's ordinance favored a "single local proprietor" (*id.* at 392) and thus gave that proprietor "an advantage over rival businesses" (*id.* at 394). But a governmental entity can be a "local proprietor" every bit as much as a private one.[4]

Indeed, as discussed above, the core reasoning of the Court's opinion applies fully whether the government or a private entity owns and/or operates the preferred facility. As the Court observed:

> The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.

Id. at 390. Regardless of who owns the preferred facility, a flow-control law, by "allow[ing] only the favored operator to process waste that is within the limits of the town," constitutes "economic protectionism" and threatens to result in "retaliatory measures." See *id.* at 391.[5]

---

[4] As we discuss further below (at pages 33-37), this Court has long understood that state and local governments may enter into the marketplace and compete with other businesses. See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976). When they do so, they are free to function as other businesses do, but may not use their regulatory powers to discriminate against interstate commerce. See *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984).

[5] For example, if a private interstate disposal facility sees its volumes reduced as a result of flow control, its only option might

In *National Solid Waste Management Association v. Daviess County*, 434 F.3d 898 (6th Cir. 2006), petition for cert. filed, 75 U.S.L.W. 3106 (June 28, 2006) (No. 06-359), the Sixth Circuit reached this same conclusion. In *Daviess*, the court assessed the constitutionality of a flow-control provision requiring all waste generated within Daviess County, Kentucky, to be deposited at facilities owned by the County. Applying *Carbone*, the court found there to be "little doubt" that the provision "discriminates against interstate commerce." *Id.* at 905. "By forcing [plaintiffs] to use Defendant's disposal and transfer facilities," the court held, "the Ordinance would prohibit these members from using other in-state and out-of-state facilities" and hence was "facially discriminatory against out-of-state interests." *Ibid.*

The Sixth Circuit "respectfully disagreed" with the Second Circuit's view that the public-private distinction could be squared with *Carbone*. It pointed out that this Court's focus in *Carbone* "was on the harm to out-of-state businesses and the local market, as opposed to the benefit conferred to the local provider." *Id.* at 910-911. As the court observed, "this harm would occur regardless of who owned the benefited facility." *Id.* at 911. The Sixth Circuit further noted that Clarkstown's transfer station was "quite clearly owned in fact

---

be to transfer title to a local county waste authority in exchange for the locality's enactment of a provision requiring that all local waste be transported to that facility. There can be no doubt that the Commerce Clause was included in the Constitution to prevent just this sort of restriction on interstate trade. See *State of Minnesota v. Barber*, 136 U.S. 313, 321 (1890) ("the enactment of a similar statute by each one of the states composing the Union would result in the destruction of commerce among the several states").

by the municipality" (*id.* at 912)[6]—compelling the conclusion that this Court, in striking down Clarkstown's flow-control ordinance, had "implicitly rejected the public-private distinction." *Ibid.*

In the end, the only difference between Clarkstown's facility and respondents' facilities is that respondents hold title to their facilities already, whereas Clarkstown had a contractual right to obtain title to its transfer station, at nominal cost, after several years. Nothing in *Carbone* suggests that this one fact made a dispositive difference—or indeed any difference—to the majority's decision. If the Court had intended its holding to preclude the flow-control ordinance only for the few months until the town was to receive record title to the facility (an event which has since occurred), it surely would have said so.

Indeed, the public-private distinction is irreconcilable with this Court's renunciation of the use of formalistic distinctions in resolving Commerce Clause challenges. Under the Second Circuit's decision, the validity of flow control turns entirely on the identity of the record title owner of the preferred facility. If legal title to a facility is in the name of a private entity, a law requiring that waste be delivered to that facility is subject to the Court's virtually *per se* rule of invalidity. If legal title to a facility is in the name of a public entity—even if constructed and operated by a private entity—the very same law would be evaluated under the more deferential *Pike* test (which, as construed by the Second Circuit at least, can never really be violated when the facility is pub-

---

[6] The Sixth Circuit further explained: "At most, the private contractor was an agent of the town, collecting tipping fees on behalf of the town and then applying these fees to the construction costs that were not directly charged to the town because of the agreement." *Daviess*, 434 F.3d at 912.

licly owned). The effect of the law on interstate commerce is precisely the same, yet the result couldn't be more different.

The Second Circuit's decision, in short, exalts form over substance. In so doing, it deviates markedly from this Court's modern Commerce Clause jurisprudence, which has steadfastly "eschewed formalism" in favor of "a sensitive, case-by-case analysis of purposes and effects." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994); see also *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 373 (1991) ("[w]e seek to avoid formalism and to rely upon a consistent and rational method of inquiry") (internal quotation marks omitted). For example, during the middle part of the twentieth century, the Court drew a distinction between taxes on the privilege of engaging in interstate commerce and taxes on the privilege of using a state's highways, holding the former unconstitutional and the latter permissible. Later, however, the Court renounced this distinction as "a triumph of formalism over substance" (*Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 281 (1977)) that "allowed the validity of statutes to hinge on 'legal terminology,' 'draftsmanship and phraseology'" (*Quill Corp. v. North Dakota*, 504 U.S. 298, 310 (1992) (quoting *Complete Auto*, 430 U.S. at 281)).

The public-private distinction embraced by the Second Circuit is a throwback to the formalism that this Court has renounced. The appropriate focus is, instead, "whether the [challenged law] produces a forbidden effect" (*Complete Auto*, 430 U.S. at 288). Because the flow-control provisions here clearly produce the same "forbidden effect" as the ordinance invalidated in *Carbone*, they should suffer the same fate.

2. The public-private distinction rests on an overly narrow reading of this Court's prior Commerce Clause decisions.

In carving out its "public facilities" exception to *Carbone*, the Second Circuit relied principally on a narrow read-

ing of the "local processing cases" cited in *Carbone*. The court of appeals asserted that the laws challenged in these cases each "favored a local private business, industry or investment (not a state-owned facility or a public monopoly) to the detriment of out-of-state competitors." Pet. App. 45a. In its view, the concerns animating these cases disappear when the favored facility is owned by a public entity. *Id.* at 46a-48a.

In fact, the concerns underlying the "local processing" and other cases cited in *Carbone* extend well beyond the preferential treatment of in-state businesses over out-of-state competitors. These cases make clear that discrimination is present whenever parochial state measures restrict the flow of commerce across state lines—whether by requiring operations to be performed in-state rather than elsewhere, by restraining interstate competition for the in-state market, or by monopolizing the state's resources for its own citizens.

"The common thread of all these cases is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976). Flow-control measures that impose regulatory barriers to the exportation of waste squarely implicate these concerns whether title to the preferred facility is owned by a private entity or a public one.

a. Local processing requirements (export restrictions)

In *Toomer v. Witsell*, 334 U.S. 385 (1948), and *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984)—both cited in *Carbone*—the Court invalidated laws requiring the local performance of operations that could otherwise be performed out of state.

In *Toomer*, the challenged provision required boats licensed to trawl for shrimp in South Carolina to dock at a South Carolina port and unload, pack, and stamp their catch

before shipping or transporting it out of state. 334 U.S. at 391. As the Court explained, "an inevitable concomitant of a statute requiring that work be done in South Carolina * * * is to divert to South Carolina employment and business which might otherwise go to Georgia; the necessary tendency of the statute is to impose an artificial rigidity on the economic pattern of the industry." *Id.* at 403-404. That observation would have been equally apt—and the Commerce Clause violation equally serious—had the in-state ports and packing facilities been owned by the state.

In *Wunnicke*, an Alaska statute required timber taken from local land to be processed within the State before it could be exported. Because this amounted to "a naked restraint on export of unprocessed logs," the Court found there to be "little question that the processing requirement cannot survive scrutiny under the precedents of the Court." 467 U.S. at 99. The Court found support in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), in which it noted that it had "'viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere.'" *Wunnicke*, 467 U.S. at 100 (quoting *Pike*, 397 U.S. at 145). As the Court stated, "[e]ven where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been held to be virtually *per se* illegal." *Ibid.* (citation omitted).

The teachings of *Toomer* and *Wunnicke* apply squarely here. Just like the provisions that troubled the Court in those cases, the requirement that waste be transported to respondents' facilities keeps within the State money (tipping fees) and jobs (for workers at those facilities) that might otherwise leave the state if the work could be performed more efficiently elsewhere. The flow-control provisions also constitute "a naked restraint of export of unprocessed" waste. Accordingly, they are just like provisions that this Court has deemed

"virtually *per se* illegal," despite the fact that the facility that has been granted the processing monopoly is publicly owned.

According to the court of appeals, the local processing requirements imposed by the flow-control ordinances here are not discriminatory because private businesses within and outside the State are equally affected by the restriction. See Pet. App. 48a. As this Court explained in *Carbone*, however, a law that prefers intrastate over interstate commerce is "no less discriminatory because in-state or in-town processors are also covered by the prohibition." 511 U.S. at 391. That is self-evidently true here: Even though the flow-control measures favor public facilities, they nonetheless "artificially encourage in-state production even when the same [services] could be [provided] at lower cost in other States." *West Lynn Creamery*, 512 U.S. at 193. Accordingly, they discriminate against interstate commerce and should be invalidated.

b. Limiting interstate sales to state residents (import restrictions)

The flow-control provisions also are analogous to state and local measures—long deemed discriminatory by this Court—that prevent out-of-state sellers from competing for the patronage of in-state customers.

In *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), for example, an ordinance prohibited the sale of milk in Madison that had not been bottled within five miles from the city's central square. Although the City defended the regulation as a health measure, the Court found it to be unconstitutional because it "excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois." *Id.* at 354. According to the Court, such provisions "would invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Id.* at 356. Notably, they would have precisely the same impact had the bottling facilities been owned and operated by public rather than private entities.

Similarly, in *State of Minnesota v. Barber*, 136 U.S. 313 (1890), the Court invalidated a law requiring that all meat sold in Minnesota be inspected by a state-appointed inspector prior to slaughter. In practical effect, the provision amounted to "an absolute prohibition upon sales in Minnesota of meat from animals not slaughtered within its limits." *Id.* at 322. In holding the law unconstitutional, the Court emphasized that the statute denied citizens of other states the privilege of selling meat within Minnesota (*ibid.*) and that such provisions, if adopted widely, "would result in the destruction of commerce among the several states" (*id.* at 321). That would have been equally true if Minnesota's regulation had required meat to be slaughtered at publicly owned and operated slaughterhouses within the State rather than private ones.

Here, as in *Dean Milk* and *Barber*, a local government has used its regulatory power to deny out-of-state sellers the right to transact business with the Counties' commercial waste haulers. The regulatory foreclosure of the local market is no less offensive to the Commerce Clause because a public entity rather than a private business is the preferred in-state seller.

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935), is also instructive. There, a New York statute prohibited the importation of milk unless the importer had paid the producer an amount no less than the minimum price established for such transactions in New York. The purpose of the statute was to ensure that New York's controlled prices—which the State deemed essential to maintaining a steady and wholesome milk supply for its citizens—were not undercut by out-of-state competition. *Id.* at 523. The Court held that the provisions violated the Commerce Clause. As the Court explained, "[i]f New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the

power of the nation." *Id.* at 522. This preclusion of interstate price competition surely would have been equally impermissible had the protected farms been owned and operated by the State rather than by private entities.

Although the facts are obviously quite different, this case implicates the same legal principles as *Baldwin*. In *Baldwin*, the State imposed price restraints to prevent out-of-state milk suppliers from undercutting the above-market prices that the State deemed necessary to support its milk industry. Here, the Counties have imposed flow control to prevent out-of-state competitors from undercutting the above-market prices the Counties deem necessary to support their local waste management facilities. Indeed, the regulatory restraint on interstate trade is more severe here than it was in *Baldwin* because the Counties' ordinances preclude competition by out-of-state firms at any price. As in *Baldwin*, the resulting restraints on interstate trade obviously function "to suppress or mitigate the consequences of competition between the states" (*ibid.*), in violation of the Commerce Clause.

According to the court of appeals, the trade restrictions in this case do not violate the Commerce Clause because "[t]he principal burden of any economic inefficiency imposed by the Counties' ordinances falls on the residents of the Counties," who "must pay over twice as much to dispose of their solid waste as they paid prior to the adoption of the ordinances." Pet. App. 48a. In *Dean Milk*, *Barber*, and *Baldwin*, however, in-state consumers also bore the brunt of the higher costs imposed by the protectionist measures at issue. Indeed, "[t]he cost of a tariff is also borne primarily by local consumers, yet a tariff is the paradigmatic Commerce Clause violation." *West Lynn Creamery*, 512 U.S. at 203.

As this Court has observed, citizens of states enacting protectionist measures "have as much right to protection against the enactments of that state interfering with the freedom of commerce among the states as have the people of

other states." *Barber*, 136 U.S. at 326; see also *Alexandria Scrap*, 426 U.S. at 809 ("every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any") (quoting *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949)). Here, residents of the Counties have as much right to benefit from the free flow of interstate commerce as the out-of-state firms that seek their business. The fact that these in-state consumers apparently pay an economic price for their governments' protectionist enactments does not insulate those measures from strict scrutiny under the Commerce Clause.[7]

c. Hoarding resources for local residents

Finally, this case offends the principle that a State may not hoard in-state resources for the benefit of its own citizens. That principle was at work in *City of Philadelphia v. New Jersey*, in which the Court invalidated a provision that prohibited the disposal of waste from outside the State at landfills within the State. No argument was made that in-state commercial interests were benefited by the measure: To the contrary, New Jersey landfill operators were among the plaintiffs. 437 U.S. at 626. The Court nevertheless held that the New Jersey law "falls squarely within the area that the Commerce puts off limits to state regulation." *Id.* at 628.

As the Court explained, "a State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the grounds that they are required to satisfy local demands or because they are needed by the people of the State." *Id.* at 627 (quoting *Foster-Fountain Packing Co. v. Hayden*, 278 U.S. 1, 10 (1928)). According to

---

[7] It merits mention that one reason why localities prefer flow control to taxation and bond financing is that the economic burden of the former on local residents is less direct and therefore less likely to draw criticism. See PORTER, *supra*, at 112.

the Court, whether the State sought to keep articles of commerce within the State or outside it, "[w]hat is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *Id.* at 628; see also *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (striking down provision that forbade the export of minnows for sale outside the state).

These principles apply squarely in this case. The Counties have prohibited privately owned articles of trade—waste—from being shipped and sold in interstate commerce so that all local demand for disposal of that material can be harnessed in support of facilities that serve the Counties' citizens. The prohibition is no less parochial or protectionist because the facilities are owned by the Counties themselves rather than by private businesses.

The court of appeals acknowledged that "[a] blanket prohibition against the hoarding of articles of commerce would appear to preclude the Counties' flow control scheme." Pet. App. 47a. In its view, however, "a local law discriminates against interstate commerce when it hoards local resources *in a manner* that favors local business, industry, or investment over out-of-state competitors." *Ibid.* Cases such as *City of Philadelphia v. New Jersey* and *Hughes* do not support this distinction: In those cases, no "local business, industry or investment" was benefited by the challenged provisions. Nevertheless, this Court held that the States' efforts to isolate their citizens from the national economy constituted protectionist measures that were *per se* invalid under the Commerce Clause.

3. Governmental entities participating in the market may not employ their regulatory powers to favor their own facilities over out-of-state entities.

The court of appeals acknowledged that state or local measures discriminate against interstate commerce when they

"favor[] in-state business or investment at the expense of out-of-state businesses." Pet. App. 46a. It held, however, that a public facility selling waste disposal services is not an "in-state business" for purposes of analysis under the Commerce Clause. That conclusion is in tension with this Court's decisions applying the market participant doctrine. Those cases make clear that when a state or local government enters the market—as the Counties have done here—it may not use its regulatory powers to favor that activity at the expense of interstate commerce.

This Court has explained that, in analyzing governmental activities under the Commerce Clause, it "cannot ignore the similarities of private businesses and public entities when they function in the marketplace." *Reeves, Inc. v. Stake*, 447 U.S. 429, 439 n.12 (1980). The Court has ruled that, "if a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities." *Wunnicke*, 467 U.S. at 93. In defining the limits of the market-participant doctrine, however, the Court has made clear that, when a State uses its regulatory muscle in connection with marketplace activity, it may not do so in a manner that disfavors interstate commerce.

For example, in *Reeves* the Court held that South Dakota could choose to sell cement produced by State-owned plants only to South Dakota citizens. As the Court explained, just as a private business owner is free "to exercise his own independent discretion as to parties with whom he will deal" (*Reeves*, 447 U.S. at 438-439), the Commerce Clause does not limit a State's refusal to deal with certain parties when it acts as a market participant. The Court was careful to point out, however, that the State could ***not*** use its regulatory power to give its plant a competitive advantage in the marketplace: In holding that South Dakota's conduct did not violate the Commerce Clause, it noted that the State had not "restricted the ability of private firms or sister States to set up plants within its borders." *Id.* at 444.

If South Dakota had ***required*** its citizens to purchase cement from its plant rather than from out-of-state providers, this Court undoubtedly would have held that its activity violated the Commerce Clause. Yet that is precisely what the Counties have been allowed to do here.

In *Wunnicke*, the Court invalidated Alaska's requirement that lumber purchased from the State be processed within the State prior to export. In holding that the requirement was discriminatory, the Court explained that the State could not use its market participation to impose a quasi-regulatory measure that the Commerce Clause would forbid. 467 U.S. at 96. The decision below turns *Wunnicke* inside out: It posits that, when the government itself is the seller of in-state processing services, it may use its regulatory power to require private actors to purchase those services rather than deal with competing out-of-state service providers. That result clearly is inconsistent with the spirit of this Court's decisions.

In *Daviess,* the Sixth Circuit highlighted this flaw in the Second Circuit's reasoning. 434 F.3d at 912. The court first explained that Daviess County had not ***eliminated*** the private market, as would be the case if the County had begun providing waste collection and disposal without charge to residents and businesses. Instead, it was clearly participating in the market: As the court observed, "[a] market is where a seller sells goods or services, and a buyer buys good or services." *Id.* at 908. Under the flow-control ordinance, "the market for solid waste disposal would continue to exist in Daviess County * * *, and Defendant would have a monopoly in that market. * * * Defendant would be forcing waste collectors to purchase its waste disposal services; Defendant would remain as the lone seller in this market as the result of its regulation." *Ibid.*

The Sixth Circuit explained that an ordinance favoring the County's transfer station was just as troubling as one favoring a local business because, as a practical matter, "Davi-

ess County ***is acting as a local business in the local industry of waste disposal.***" *Id.* at 912 (emphasis added). It stated:

> [U]nder the Ordinance, Defendant would be acting in a dual role as a local business selling waste disposal services, and as a local government hoarding "waste, and the demand to get rid of it, for the benefit" of this business. *Carbone*, 511 U.S. at 392, 114 S. Ct. 1677. ***The fact that Defendant acts as both a business and a government, as opposed to just a government, does not cloak its facially protectionist activity from the appropriate scrutiny under the Commerce Clause.***

Ibid. (emphasis added).

The exact same thing is true here: The Counties have entered into the business of selling waste disposal services to private haulers, but are using their regulatory powers to force haulers to patronize their facilities rather than competing out-of-state facilities. This is impermissible: As this Court stated unequivocally in *Carbone*, "having elected to use ***the open market*** to earn revenues for its project, the town may not employ discriminatory regulation to give that project an advantage over rival businesses from out of State." 511 U.S. at 394 (emphasis added).[8]

---

[8] It merits mention that, in the case in which the Court first recognized the market-participant doctrine, the Court found it significant that "the commerce affected by the [challenged law] appears to have been created, in whole or in substantial part, by the [overall program of which the challenged law was a part]." *Alexandria Scrap*, 426 U.S. at 809 n.18; see also *id.* at 815-816 (Stevens, J., concurring). The present case presents the flip side of this situation: Commerce in processing services and recyclables pre-dated respondents' entry into the waste processing business and, by fiat,

As this Court stated in *Reeves*, "[t]he basic distinction * * * between States as market participants and States as market regulators makes good sense and good law." 447 U.S. at 436. The Second Circuit has impermissibly disregarded that distinction. Just as "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market" (*id.* at 437), there also is no basis to immunize from strict scrutiny State regulation that shelters the State's own commercial activity from interstate competition. To create such a loophole would violate this Court's admonition that a State's market participation may not be used to "swallow[] up the rule that States may not impose substantial burdens on interstate commerce." *Wunnicke*, 467 U.S. 98.

C. *Stare Decisis* Principles Command Reversal Of The Decision Below

Because only the most formalistic distinctions separate the flow-control provision in *Carbone* from the ones here, the decision below makes it a simple matter for state and local governments to re-introduce flow control. If widely adopted, this approach would effectively overrule *Carbone*. *Stare decisis* principles argue against such a sea change in the law governing interstate commerce in waste.

Since *Carbone* was decided, many flow-control provisions have been held unconstitutional.[9] In a high percentage

---

respondents have arrogated to themselves all of that pre-existing commerce.

[9] See, *e.g.*, *U & I Sanitation v. City of Columbus*, 205 F.3d 1063 (8th Cir. 2000); *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1384-1385 (8th Cir. 1997); *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995); *Coastal Carting Ltd. v. Broward County*, 75 F. Supp. 2d 1350 (S.D. Fla. 1999); *Zenith/Kremer Waste Sys., Inc. v. Western Lake Superior Sanitary Dist.*, 1996 WL 612465, at *1-*3, *10 n.13 (D. Minn.

of those cases, the flow-control provisions required delivery of waste to public facilities.[10] In general, therefore, both

---

July 2, 1996); *Southcentral Pa. Waste Haulers Ass'n v. Bedford-Fulton-Huntingdon Solid Waste Auth.*, 877 F. Supp. 935, 943 (M.D. Pa. 1994); *Empire Sanitary Landfill, Inc. v. Pennsylvania*, 684 A.2d 1047, 1056 (Pa. 1996).

[10] See *Huish Detergents, Inc. v. Warren County*, 214 F.3d 707, 715-716 (6th Cir. 2000) (ordinance requiring all waste to be processed at county-owned transfer station discriminated against interstate commerce); *Waste Mgmt., Inc. v. Metropolitan Gov't*, 130 F.3d 731, 733, 736 (6th Cir. 1997) (striking down flow-control ordinance that required all residential waste to be disposed of at publicly owned facility); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 794, 809-810 (3d Cir. 1995) (two of the three designated facilities in one of two consolidated cases were publicly owned; case remanded for determination of whether process of designating facilities was discriminatory); *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701 (3d Cir. 1995) (holding that New Jersey regulations requiring flow control discriminated against interstate commerce, and making no distinction based on whether preferred facility was publicly or privately owned); *Waste Sys. Corp. v. County of Martin*, 985 F.2d 1381, 1383 (8th Cir. 1993) (striking down ordinance that required all waste to be delivered to facility owned by waste district); *Nat'l Solid Waste Mgmt. Ass'n. v. Pine Belt Solid Waste Mgmt. Auth.*, 261 F. Supp. 2d 644, 649-650 (S.D. Miss. 2003) (holding that municipal ordinances requiring delivery of local waste to publicly owned facilities discriminated against interstate commerce), rev'd in part, dismissed in part, 389 F.3d 491 (5th Cir. 2004) (dismissing discrimination claim on the basis that plaintiffs lacked standing), cert. denied, 126 S. Ct. 332 (2005); *Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth.*, 814 F. Supp. 1566 (M.D. Ala. 1993) (striking down flow-control ordinance that required all waste to be disposed of at publicly owned facility), aff'd per curiam, 29 F.3d 641 (11th Cir. 1994); *Heier's Trucking, Inc. v. Waupaca County*, 569 N.W.2d 352 (Wis. Ct.

regulators and the regulated community understand that flow control "is no longer permitted." PORTER, *supra*, at 112).[11]

Despite the settled expectations of the waste industry, long-haul transporters, host localities, and waste generators that flow control is unlawful, states and local governments across the country remain eager to adopt flow control if the opportunity arises again. See Brief Amicus Curiae of the Bristol Resource Recovery Operating Committee, *et al.*, filed in *United Haulers II*, at 2 (group of local governmental entities contend that "flow control is integral to fulfilling" their responsibilities for solid waste management).[12] If the decision below is affirmed, it seems clear that many local governments that own (or can assume ownership of) waste processing facilities will impose flow control. Indeed, some have already done so. See *id.* at Appendix A (representation by several governmental entities that own waste facilities they have adopted flow control since *United Haulers I* was

---

App. 1997) (affirming order striking down ordinance that required recyclables to be delivered to county-owned processing facility).

[11] Flow-control ordinances that exempt waste destined for out-of-state processing or disposal are a possible exception to this general rule. Provisions containing such an exception generally have been upheld. See, *e.g.*, *On the Green Apartments L.L.C. v. City of Tacoma*, 241 F.3d 1235 (9th Cir. 2001); *Ben Oehrleins*, 115 F.3d at 1385-1387; *Vince Refuse Serv., Inc. v. Clark County Solid Waste Mgmt. Dist.*, 1995 WL 253121 (S.D. Ohio Mar. 7, 1995). But see *Randy's Sanitation, Inc. v. Wright County*, 65 F. Supp. 2d 1017 (D. Minn. 1999) (intrastate flow-control ordinance unconstitutionally burdened interstate commerce).

[12] As of 1995, at least 39 states and the District of Columbia had authorized localities to impose flow control. See United States Environmental Protection Agency, Report to Congress: *Flow Controls and Municipal Solid Waste* II-1 to II-5 (Mar. 1995), *available at* http://www.epa.gov/epaoswer/nonhw/muncpl/flowctrl/report chpt-ii.pdf.

decided); see also *Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Solid Waste Mgmt. Auth.*, 261 F. Supp. 2d 644, 649-650 (S.D. Miss. 2003) (assessing constitutionality of post-*United Haulers I* ordinance that requires waste to be disposed of at County-owned facility). In addition, the municipalities that have, in an effort to satisfy *Carbone*, exempted from their flow-control laws waste that is destined for out-of-state disposal will surely eliminate the exemptions. Thus, affirmance of the decision below would, in large measure, have the practical effect of overruling *Carbone*.

The Court should be particularly hesitant to take this step, given that "Congress [remains] free to decide whether, when, and to what extent the States may burden [the] interstate" waste services market with local flow-control regulation. *Quill Corp.*, 504 U.S. at 318. Because "Congress has the final say over regulation of interstate commerce, and it can change the rule of [*Carbone*] by simply saying so," "the doctrine of *stare decisis* has 'special force'" with respect to dormant Commerce Clause precedent, just as it does in statutory interpretation cases. *Id.* at 320 (Scalia, J., concurring) (quoting *Patterson v. McLean Credit Union*, 491 U. S. 164, 172-73 (1989), superseded by statute, Civil Rights Act of 1991, P.L. 102-166 § 101); cf. *ASARCO, Inc. v. Idaho Tax Comm'n*, 458 U.S. 307, 350 (1982) (O'Connor, J., dissenting) (the Court's "constitutional shortsightedness [in relying on the Due Process Clause rather than the dormant Commerce Clause] overlooks the fact that Congress, not this Court, holds the ultimate responsibility for maintaining a healthy system of interstate commerce").

This is especially true given that Congress actually considered whether *Carbone*'s holding should be modified legislatively and declined to take action. See *Quill Corp.*, 504 U.S. at 318. In the wake of *Carbone*, both Houses considered bills that would have grandfathered certain pre-*Carbone* flow-control laws. See Interstate Transportation of Municipal Solid Waste Act of 1995, S. 534, 104th Cong., 1st Sess.

(1995); Solid Waste Disposal Act, H.R. 4683, 103d Cong., 2d Sess. (1994). Other broader proposals would have given state and local governments the authority to enact flow control prospectively. See, *e.g.*, S. REP. 104-52, at 8-9 (1995); Martha M. Canan, *PSA Lobbying Congress to Give Municipalities Control Over Local Garbage Flow*, THE BOND BUYER, May 18, 1994; *Legislative Status Report*, THE BOND BUYER, Nov. 12, 1997. Notably, when it considered such proposals, the Senate understood that this "Court's ruling in * * * *Carbone* * * * has made it evidently clear that, absent Congressional action, the exercise of flow control by States and political subdivisions is unconstitutional." S. REP. 104-52, at 8.

Notwithstanding its understanding that flow control would remain unlawful unless it acted, Congress has left *Carbone*'s holding undisturbed. This Court, too, should reaffirm *Carbone* by reversing the decision below.

II. THE FLOW-CONTROL PROVISIONS FAIL THE *PIKE* TEST

Even if the Court concludes that the public ownership of the Counties' facilities exempts the Counties' flow-control ordinances from strict scrutiny, it should strike down the ordinances under the *Pike* test. As the court of appeals acknowledged, the flow-control ordinances have "the direct and clearly intended effect of prohibiting articles of commerce generated within the Counties from crossing * * * interstate lines." Pet. App. at 13a. Such an "export barrier" (*ibid.*) imposes a severe burden on interstate commerce that cannot be justified by the local interests alleged to be at stake here.

A. The Flow-Control Ordinances Impose A Burden On Interstate Commerce That Is Excessive In Comparison To The Local Interests That It Serves.

Under *Pike*, when an evenhanded regulation has an incidental effect on interstate commerce, "it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. "[T]he extent of the burden that will be tolerated will * * * depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Ibid.* The *Pike* analysis "necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 441 (1978). Here, the burden on interstate trade imposed by respondents' flow-control measures is so direct and substantial that it markedly outweighs the governmental interests asserted.

Justice O'Connor's concurring opinion in *Carbone* is instructive. She believed that Clarkstown's flow-control ordinance was exempt from strict scrutiny because "in-town competitors of the transfer facility [were] equally burdened" by the legislation. 511 U.S. at 405 (O'Connor, J., concurring in the judgment); see also *id.* at 404 ("the garbage sorting monopoly is achieved at the expense of all local competitors, be they local or nonlocal"). Although her starting point was thus very similar to that of the court of appeals, her conclusion was very different: While the Second Circuit took the view that the burdens on interstate commerce here are virtually nonexistent, Justice O'Connor concluded that Clarkstown's similar ordinance "impose[d] an excessive burden on interstate trade" that was not outweighed by the interests served by the measure. *Id.* at 405.

Justice O'Connor viewed the flow-control ordinance as imposing the very same burden on interstate commerce that caused the majority to deem it discriminatory: She noted that "the ordinance 'squelches competition in the waste-processing service altogether, leaving no room for investment from outside.'" *Id.* at 406 (quoting the majority opinion at 392). She concluded that the ordinance's "dramatic impact on the flow of goods" (*id.* at 405) could not be justified by the town's interest in ensuring the financial viability of the facility. As she explained, many non-discriminatory financing measures were available to the town, which "could finance the project by imposing taxes, by issuing municipal bonds, or even by lowering its price for processing to a level competitive with other waste processing facilities." *Id.* at 405-406.

The exact same thing is true here: The flow-control ordinances create an overt barrier to interstate trade of the sort that has "been consistently invalidated by this Court under the Commerce Clause." *Pike*, 397 U.S. at 141-142; see also *id.* at 145 ("[T]he Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. * * * Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal."). At the same time, respondents could finance their waste management facilities without imposing any regulatory restrictions on interstate trade. See J.A. 215a. And the other ostensible justifications for the flow-control measures—promotion of recycling and avoidance of environmental liabilities—are equally spurious. See pages 17-19, *supra*.

Even when viewed in isolation, therefore, the flow-control measures do not satisfy the *Pike* test. But a regulation's true impact on interstate commerce must be evaluated "by considering * * * what effect would arise if not one, but many or every, [jurisdiction] adopted similar legislation."

511 U.S. at 406 (internal quotation marks omitted). As Justice O'Connor noted in *Carbone*, "[o]ver 20 states have enacted statutes authorizing local governments to adopt flow control laws." *Id.* 406.[13]

> If the localities in these States impose the type of restriction on the movement of waste that Clarkstown has adopted, the free movement of solid waste in the stream of commerce will be severely impaired.

Ibid. Such "pervasive flow control," she said, would "result in the type of balkanization the Clause is primarily intended to prevent." *Ibid.*

Here, too, the widespread adoption of the flow-control measures at issue would virtually "eliminat[e] the movement of waste between jurisdictions." *Id.* at 407.[14] Each jurisdiction's geographic boundaries would demarcate a separate region for the purchase and sale of waste processing, with no crossing of those boundaries in either direction. The resulting proliferation of separate trading areas would be antithetical to the basic purposes of the dormant Commerce Clause.

B. The Second Circuit's Application Of The *Pike* Test Was Fundamentally Flawed.

The Second Circuit's determination that respondents' flow-control measures satisfy *Pike* was not based on a searching evaluation of the provisions' benefits and burdens. To the contrary, both the trial court and the court of appeals categorically discounted the burdens associated with the flow-control laws on the ground that they affect private facilities within and outside the State the same way. That ap-

---

[13] As noted above, that figure rose to 39 by 1995.

[14] Indeed, the Counties' regime is some ways more insular than Clarkstown's: for example, haulers are not permitted to sell curbside recyclables in interstate commerce, but must deliver them to the designated in-state facilities.

proach—and the resulting decision to uphold the flow-control provisions despite the weakness of the justifications for them—plainly was erroneous.

The Second Circuit has repeatedly ruled that a non-discriminatory regulation need not be put through the *Pike* balancing test at all unless the putative burden on interstate commerce "***is qualitatively or quantitatively different from that imposed on intrastate commerce***." *Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205, 217 (2d Cir. 2004) (citations omitted) (emphasis added). The Magistrate Judge (whose opinion was adopted by the district court) took this to mean that "regulatory provisions under scrutiny pass dormant Commerce Clause muster ***unless they treat out-of-state entities less favorably than similarly situated in-state concerns***." Pet. App. 95a (emphasis added); *see also ibid.* ("The critical inquiry * * * is whether an out-of-state business is treated less favorably than one similarly situated but within the state."). In the court's view, the fact that "a local private trash business is treated no differently" under the County's regulatory regime "than one situated out of state" was, by itself, dispositive. *Id.* at 96a. It therefore found that there was no need to "proceed to the next step of balancing the burdens against the putative benefits associated with the legislation." *Id.* at 99a; see also *id.* at 70a ("[I]t was not error * * * for the Magistrate Judge to decline to engage in the second part of the *Pike* balancing test by weighing non-existent burdens against obvious benefits.").

Unlike the district court, the court of appeals entertained the possibility that "regulations that explicitly create a prohibitory barrier to commerce for the benefit of a government entity * * * impose some differential burden on interstate trade which should be examined under the *Pike* test." Pet. App. 15a. But the suggestion that the court might broaden its understanding of the burdens cognizable under *Pike* proved to be an empty one. Because it believed that the provision did not affect the ability of in-state and out-of-state "busi-

nesses to compete on an equal footing," the court of appeals reasoned that "the burden imposed on interstate commerce must be insubstantial." *Id.* at 18a.[15]

This conclusion predetermined the outcome of the court's analysis. As it said:

> Our conclusion that the assumed burden created by the challenged ordinances is slight means that the defendants need to present only minimal showing of local benefit in order to compel a finding that this burden is not 'clearly excessive' to the benefits that the ordinances provide.

Ibid. As we discuss above (at pages 17-19), the putative benefits of the flow-control provisions are indeed "minimal." Predictably, however, the court of appeals concluded that they "easily clear[ed]" the low hurdle it had established for them. *Ibid.*

The lower court's understanding of the *Pike* test was fundamentally flawed: This Court never has indicated that searching review under *Pike* is available only when a regulation gives in-state businesses a competitive advantage over out-of-state businesses. Quite the contrary: The *Pike* test comes into play only when a state or local rule "regulates ***evenhandedly***" and thus has "only incidental" effects on interstate commerce. *Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982) (quoting *Pike*, 397 U.S. at 142) (emphasis added); see also *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). When a state or local

---

[15] In fact, the flow-control provisions do impose a differential burden on interstate versus intrastate commerce. Under the current regime, private haulers spend millions of dollars every year purchasing waste processing and disposal services from respondents' facilities. See J.A.174a. Yet these haulers have been flatly prohibited from purchasing these services in interstate commerce.

law ***does*** have a material differential impact on in-state and out-of-state commercial entities, it is deemed to have the "practical effect of * * * discriminating" against interstate commerce, and it is subject, ***not*** to the *Pike* test, but to the rule of virtual *per se* invalidity that governs discriminatory state regulations. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 350-351 (1977); see, *e.g.*, *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 281 (1987) (state tax that has a discriminatory effect will be struck down even if it does "not allocate tax burdens between insiders and outsiders in a manner that is facially discriminatory").

As Justice O'Connor explained, "[e]ven a nondiscriminatory regulation may nonetheless impose an excessive burden on interstate trade when considered in relation to the local benefits conferred." 511 U.S. at 405. Under this Court's decisions, the Commerce Clause requires invalidation of those measures that apply evenhandedly, but nonetheless unduly impede the flow of goods and services across state lines. See also, *e.g.*, *Raymond Motor Transp.*, 434 U.S. at 445 (invalidating even-handed truck-length regulation because it "impose[s] a substantial burden on the interstate movement of goods"); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 526-530 (1959) ("state regulations that run afoul of the policy of free trade reflected in the Commerce Clause must * * * bow"); *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 770 (1945) (striking down Arizona law regulating train lengths that "materially restrict[ed] the free flow of commerce across state lines").

Even if they are deemed even-handed, respondents' flow-control laws create an extreme "barrier * * * to bar out trade from other States" (*Nippert v. City of Richmond*, 327 U.S. 416, 425 (1946)), that should not lightly be upheld. Indeed, because they "require business operations to be performed in the home state that could more efficiently be performed elsewhere," they impose a "burden on commerce that has been declared to be virtually *per se* illegal." *Pike*,

397 U.S. at 145. Even though a public entity is the principal beneficiary of the flow-control laws, such significant burdens on interstate commerce cannot reasonably be regarded as "slight." Pet. App. 18a.

In holding that the flow-control provisions were permissible under *Pike*, the court of appeals also emphasized its view that the government, "consistent with the Commerce Clause, may impose a public monopoly encompassing the activities of waste collection, processing, and disposal." Pet. App. 17a. It stated:

> If a municipal government may *eliminate* the local private market for waste disposal services, we think it necessarily follows that a local government imposes no more than a limited burden on interstate commerce when it creates a partial monopoly with respect to solid waste management here, at the processing phase that has the ancillary effect of diminishing commerce in that same market.

Ibid. (emphasis in original).

That analysis suffers from several basic errors. First, the Second Circuit's premise is wrong: Although a municipal government may provide comprehensive waste management services to its citizens as a public service without violating the Commerce Clause—thus largely obviating the need for any flow-control regulation—there is no basis to conclude that it also may ***ban*** all private interstate trade in any waste having sufficient value to support such commerce.[16]

---

[16] The court of appeals cited *Gardner v. Michigan*, 199 U.S. 325 (1905), and *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905), for the proposition that municipalities may "take exclusive control of all locally generated solid waste from the moment that it is placed on the curb." Pet. App. 17a. Because neither of these two cases involved ***interstate*** commerce in waste,

Second, even assuming arguendo that a municipality can entirely eliminate the private waste market when it provides comprehensive waste collection and disposal services to its citizens, that does not mean that the restrictions on trade here are acceptable. Respondents have ***not*** assumed responsibility for waste collection and disposal throughout Oneida and Herkimer Counties. Instead, many residents and businesses still bear their traditional obligation to remove and dispose of their own waste.

When in-state generators hire commercial haulers to remove their waste, the waste enters interstate commerce. See *Fort Gratiot Sanitary Landfill*, 504 U.S. at 359 ("Whether the business arrangements between out-of-state generators of waste and the [in-state] operator of a waste disposal site are viewed as 'sales' of garbage or 'purchases' of transportation or disposal services, the commercial transactions unquestionably have an interstate character."); *Lemke v. Farmers' Grain Co.*, 258 U.S. 50, 55 (1922) ("we have defined the beginning of interstate commerce as that time when goods begin their interstate journey by delivery to a carrier or otherwise"). The Counties' use of regulatory power to force commercial haulers to bring that waste (and the associated tipping fees) to their own facilities constitutes a naked restraint on interstate trade. "[H]aving elected to use the open market to earn revenues for [their] project[s]" (*Carbone*, 511 U.S. at 394), the Counties are subject to the full power of the Commerce Clause when they impose regulatory restrictions in that market.

---

however, the Commerce Clause was neither raised nor addressed. Accordingly, "[t]hese cases cannot be read as foreclosing an argument that they never dealt with." *Walters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality op.); see also, *e.g.*, *United States v. Tucker Truck Lines*, 344 U.S. 33, 38 (1952).

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

EVAN M. TAGER
Counsel of Record
MIRIAM R. NEMETZ
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

NOVEMBER 2006

No. 05-1345

IN THE

Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., *et al.*,

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

MICHAEL J. CAHILL
Counsel of Record
GERMANO & CAHILL, PC
4250 Veterans Memorial Highway
Suite 275
Holbrook, New York 11741
(631) 588-8778

Attorneys for Oneida-Herkimer Solid Waste Management Authority

(Additional Counsel Listed on Signature Page)

205254

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

Table of Contents i

Table of Cited Authorities iii

Preliminary Statement 1

Statement of Facts 1

Operation of the System 2

Background 3

Flow Control and the Solid Waste Management Plan 6

Summary of the Argument 8

Argument 11

I. The Oneida-Herkimer Laws Do Not Discriminate Against Interstate Commerce, And The *Pike* Balance Is The Appropriate Test For Review 11

A. There Is No Discrimination Here, Therefore There Is No Commerce Clause Violation 12

B. The Public Purposes Served By Oneida-Herkimer Distinguish This Case From *Carbone* 17

Contents

Page

1. The First Objective: Public Assumption Of Environmental Risk On Behalf Of The Community 18

2. The Public System In Oneida-Herkimer Does Not Compete With Private Sector Services 23

3. The Market Participant Doctrine Does Not Apply In This Action By Appellant Haulers, And Any Indirect Regulatory Effect On Non-Parties Is Not Discrimination Against Interstate Commerce 24

4. Waste Reduction And Recycling Are Unique Governmental Purposes Consistent With National And State Policies 26

II. The Oneida-Herkimer Laws Pass the Balancing Test of *Pike v. Bruce Church* 30

A. The Laws Place No Cognizable Incidental Burden On Interstate Commerce 30

B. The Counties' Integrated System Of Waste Management Provides Benefits Possible Only Through Flow Control ... 36

C. Widespread Adoption Of Flow Control Similar To Oneida-Herkimer's Laws Would Not Burden Interstate Commerce 39

Conclusion 44

TABLE OF CITED AUTHORITIES

Page

Cases:

Alcan Aluminum Corp. v. United States, 964 F.2d 252 (3d Cir. 1992) 20-21

Ben Oehrleins & Son v. Hennepin County, 113 F.3d 1372 (8th Cir. 1997) 42

BF Goodrich v. Murtha, 958 F.2d 1192 (2d Cir. 1993) 20

Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986) 31

C&A Carbone v. Town of Clarkstown, 511 U.S. 383 (1994) ..... *passim*

California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905) 10, 29, 43

Chem. Waste Management v. Hunt, 504 U.S. 334 (1992) 13, 15

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 11, 12, 13, 14, 15, 41

CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) 32, 33, 34

Exxon v. Maryland, 437 U.S. 117 (1978) 11, 34

Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313 (11th Cir. 1990) 21

Cited Authorities

Page

Fort Gratiot Sanitary Landfill v. Michigan, 504 U.S. 353 (1992) 14, 15, 41

Gardner v. Michigan, 199 U.S. 325 (1905) 10, 43

Gen. Motors v. Tracy, 519 U.S. 278 (1997) 13

Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968) 11

Harvey & Harvey, Inc. v. County of Chester, 68 F.3d 788 (3d Cir. 1995) 42

Houlton Citizens' Coalition v. Town of Houlton, 175 F.3d 178 (1st Cir. 1999) 42

HP Hood & Sons v. DuMond, 336 U.S. 525 (1949) 42, 43

Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1984) 24

Hughes v. Oklahoma, 441 U.S. 322 (1979) 13

Keene Corp. v. United States, 508 U.S. 200 (1993) 12

Maine v. Taylor, 477 U.S. 131 (1986) 13

Minnesota v. Barber, 136 U.S. 313 (1890) 11

Nat'l Paint & Coatings Association v. Chicago, 45 F.3d 1124 (7th Cir. 1995) 36

Cited Authorities

Page

Nat'l Solid Waste Management Assoc. v. Pine Belt Regional Solid Waste Auth., 389 F.3d 491 (5th Cir. 2004) 36

New York State Trawlers Assoc. v. Jorling, 16 F.3d 1303 (2nd Cir. 1994) 36

Old Bridge Chem., Inc. v. New Jersey Dep't of Envtl. Protection, 965 F.2d 1287 (3rd Cir. 1992) 36

Oregon Waste Sys. v. Oregon Dept. of Envtl. Quality, 511 U.S. 93 (1994) 9, 12, 13, 15, 19, 29

Pacific Northwest Venison Producers v. Smitch, 20 F.3d 1008 (9th Cir. 1994) 36

Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) 20

Pike v. Bruce Church, 397 U.S. 137 (1970) 9, 10, 29, 30, 31

Pike. Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986) 26

Reeves v. Stake, 447 U.S. 429 (1980) 18

Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995) 12

South Central Timber v. Wunnicke, 467 U.S. 82 (1984) 24, 25

Cited Authorities

	Page
Sporhase v. Nebraska, 458 U.S. 941 (1982)	28
St. Paul Fire and Marine Ins. Co. v. Warwick Dyeing Corp., 26 F.3d 1195 (1st Cir. 1994)	20
U.S.A. Recycling v. Town of Babylon, 66 F.3d 1272 (2d Cir. 1995)	35
United States v. Best Foods, 524 U.S. 51 (1998) ...	20
United States v. Cello-Foil Products, Inc., 100 F.3d 1227 (6th Cir. 1996)	21
United States v. Northeastern Pharmaceutical & Chem. Co., Inc., 810 F.2d 726 (8th Cir. 1986) ...	21
USA Recycling v. Town of Babylon, 66 F.3d 1272 (2d Cir. 1995)	42
V-1 Oil Co. v. Utah State Dep't of Public Safety, 131 F.3d 1415 (10th Cir. 1997)	36
West Lynn Creamery Inc. v. Healy, 512 U.S. 186 (1994)	29
United States Constitution:	
10th Amendment	29

Cited Authorities

Page

Statutes:

Herkimer Local Law §2(c) 3

N.Y. Gen. Mun. Law §119 35

N.Y. Envtl. Conserv. Law §27-0106(1) 27

N.Y. Envtl. Conserv. Law §27-0107(1)(a) 28

N.Y. Envtl. Conserv. Law §§27-1301-27-2403 21

N.Y. Pub. Auth. Law §§2049-aa-2049-yy 4

N.Y. Pub. Auth. Law §2049-ee(4) 35

N.Y. Pub. Auth. Law §2049-ee(7) 1, 24

N.Y. Pub. Auth. Law §2049-tt(3) 4

N.Y. Solid Waste Management Act of 1988, c. 70, codified as amended in scattered sections Article 27 of N.Y. Envtl. Conserv. Law 5

Oneida Local Law §2(d) 3

42 U.S.C. §6901, *et seq.* 18, 20, 28

42 U.S.C. §6902(a) 27

42 U.S.C. §6904(a)(4) 28

42 U.S.C. §9601, *et seq.* 4, 18, 20

42 U.S.C. §9607(a)(3) 20

PRELIMINARY STATEMENT

The respondents created a public waste management system supported by the flow control laws at issue here, in response to public demand, prompted by a failed system of public and private waste management in the 1980's. The laws favor the public system and the citizens of the counties, but do not favor or disfavor any private entity on the basis of their location within or outside of the counties or the State of New York. This case will determine whether such an exercise of the police power is consistent with the Commerce Clause of the Constitution.

STATEMENT OF FACTS

The Oneida-Herkimer Solid Waste Management Authority (the "Authority") operates an integrated solid waste management system as a public monopoly in the Counties of Oneida and Herkimer, in the Mohawk River Valley, in New York. The system consists of three transfer stations, a recycling facility, a compost facility, a household hazardous waste facility, a stump grinding facility and, as of October 2006, a landfill for non-recyclable waste.[1] The objectives of the system are to foster waste reduction, maximize reuse and recycling of waste materials, reduce the toxicity of non-recyclable waste and safely dispose of non-recyclable waste, in accordance with New York State solid waste management policy and the region's Local Solid Waste Management Plan (the "Plan"). The Authority does not provide service for waste originating outside of the Counties. JA 121a-24a; N.Y. Pub. Auth. Law §2049-ee(7) (McKinney 2006).

---

1. The Authority's long-planned solid waste landfill was completed and began receiving waste on October 24, 2006. The Authority's transport and disposal contract with Waste Management of New York, operative since 1998, will terminate on December 31, 2006.

OPERATION OF THE SYSTEM

The system provides disposal and recycling services, but does not provide waste collection service. Waste collection is provided by the region's constituent cities, towns and villages,[2] and by private sector waste haulers by arrangement with consumers and municipalities. The system operates as a monopoly because the flow control laws under challenge here require all haulers and generators in the Counties to deliver waste and recyclables left at curbside to the appropriate Authority facility. ("Generators" of waste are simply all of the citizens, businesses and institutions that produce it.)

The courts below found that the flow control laws are not protectionist, do not discriminate against interstate commerce and are even-handed regulation. It is not disputed that all haulers and generators of waste, whether based locally or outside of the counties or the state, are equally subject to the laws. All pay the same system charge for the disposal of non-recyclable waste, and all are permitted to deliver recyclables and household hazardous wastes free of charge. JA 282a-85a.

The local laws are not enforced beyond the borders of Oneida and Herkimer Counties. There was no evidence presented below that these laws interfere in any way with the regulatory systems of any other state, or any other county within New York State. From 1991 through 2006, the Authority arranged for the disposal of non-recyclable waste delivered to the Authority's transfer stations at landfills located in Pennsylvania (1991-97) and western New York (1998-2006). Contracts with these facilities were procured

2. The more densely populated areas of the Counties, including the cities of Utica, Rome and their surrounding suburbs, are served by municipal collection with public employees or private contractors. Persons in other communities are served by private haulers or self-haul to Authority facilities.

through public competitive bidding pursuant to standards established by the Authority. JA 358a-59a.

The courts below found that the Authority's bidding process was open to in-state and out-of-state bidders and did not discriminate against any bidder on the basis of its location in another state. Pet. App. 67a, 95a-6a. Because the laws require that all waste in the region be delivered to the Authority, all landfills other than the facility selected by the Authority are unable to receive Oneida-Herkimer waste. As of January 1, 2007, all non-recyclable non-hazardous waste in the Counties will be disposed of at the Authority's landfill in Oneida County.

The laws require the waste generators of the Counties to recycle, and direct that recyclable materials be separated at curbside and delivered to the Authority's recycling facility. The laws allow generators to make direct arrangements with buyers of recyclables, but if such arrangements are not made, the recyclables are to be placed at curbside and delivered to the Authority. *See* Oneida Local Law §2(d); Pet. App. 122a; Herkimer Local Law §2(c); Pet. App. 135a. At the recycling center, the Authority further sorts and separates the material into 37 different commodities which are marketed to buyers in interstate commerce. JA 123a, 420a-21a.

BACKGROUND

The public waste management system was created in response to public demand prompted by the collapse of traditional disposal methods in the 1980's. Historically, waste disposal in the region had been provided at local landfills operated by towns, cities, villages and private landowners, with minimal environmental safeguards. A 1969 planning study conducted for Oneida and Herkimer Counties identified 44 operating dump sites, both public and private, all of which posed varying degrees of threat to public health and the environment. In the early 1980's, health officials ordered the

closure of drinking water wells near several of these facilities. Twelve of these sites were ultimately identified as inactive hazardous waste disposal sites by State and Federal authorities. One, the privately operated Ludlow landfill in the Town of Paris, Oneida County, was named to the National Priorities List (Superfund) pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601, *et seq*. JA 450a-52a, 475a, 477a.

Clean-up and remediation costs at these sites totaled over $74 million. In the case of the Ludlow landfill, regulatory action by the state to compel its closure led to wider litigation, in which over 600 local businesses, municipalities (29 of them) and other generators, were named as third-party defendants in a cost recovery action. Of the 44 operating dump sites in 1969, only one was operating at the time these local laws were adopted in early 1990. JA 447a-52a.

The private sector provided no solutions. In 1986, only the privately-operated Mohawk Valley landfill was available to serve the City of Utica, and its operators doubled their fees to the City on short notice. Mohawk Valley was itself unlined, operating without a state permit, and under regulatory pressure to close. In September 1986, local haulers, including two of the plaintiffs in this case, called upon the Counties to develop a new regional landfill as a safeguard against the closure of Mohawk Valley, which finally occurred in 1992. JA 447a-55a, 474a-80a, 414a-19a.

The "crisis" in solid waste management was apparent, and in response to demand by all sectors of the community, the Counties undertook to reform local disposal and establish a public system capable of serving the needs of all citizens in the region. At the request of the Counties, the New York State legislature created the Oneida-Herkimer Solid Waste Management Authority in September 1988. N.Y. Pub. Auth. Law §§2049-aa-2049-yy. Among the powers granted to the Authority and the Counties, Section 2049-tt(3) of the Act

expressly authorizes the Counties, "in recognition of the public policy of the state in the . . . management of solid waste" to "displace competition with regulation or monopoly public control" and to require "that all solid waste . . . shall be delivered to a specified solid waste management-resource recovery facility." [3] JA 417a-18a, 462a-65a.

In the same year that it created the Authority, the State of New York adopted the Solid Waste Management Act of 1988.[4] The 1988 Act established a hierarchy of waste management methods for the state, providing first for waste reduction, followed by re-use, recycling, recovery of energy, and finally land disposal in order of priority. The Act also mandated the preparation of both a state-wide solid waste management plan and a series of local plans to be adopted by regional planning units and approved by the state's Department of Environmental Conservation. The Authority was charged with preparing a solid waste management plan for the Oneida-Herkimer region. JA 417a-18a.

The Authority began the planning process at its initial meeting in the fall of 1988. By May 15, 1989, a Draft Local Solid Waste Management Plan (the "Plan"), together with a Draft Generic Environmental Impact Statement ("DGEIS") were ready for public comment. The Authority conducted public hearings and received comments on the Plan for the next eight months. Four formal public hearings were conducted in July and December 1989, and numerous informal presentations were made to local governments, civic organizations and industry groups, including the local waste hauling industry. The Authority conducted 15 regular meetings during this period, at which members of the public were invited to comment on the Plan and the future of waste

3. *See*, generally, Br. of *amicus curiae* Rockland County Solid Waste Management Authority for a discussion of the role of public service monopolies in our federal system.

4. N.Y. Solid Waste Management Act of 1988, c. 70, codified as amended in scattered sections Article 27 of N.Y. Envtl. Conserv. Law.

management in the region. By December 1989, the Authority had received over 10,000 letters and other written comments on various aspects of the Plan. JA 146a-51a.

FLOW CONTROL AND THE SOLID WASTE MANAGEMENT PLAN

The Plan calls for a comprehensive public system to safely manage all of the waste generated in the two-County region. The core concept of the Plan's approach is an "integrated system" in which different management methods are brought to bear on different components of the waste stream. The overall objective is to minimize the amount of waste destined for land disposal by providing facilities and incentives to separate and recycle as much waste as possible. By agreements with the Counties, the Authority acquired some of their existing facilities, and assumed the financial obligation for the construction and operation of additional facilities called for by the Plan. JA 465a.

The flow control laws were, and remain, the foundation of the Plan and the integrated system. Prior to 1991, no household recycling service was available anywhere in the region. To institute a region-wide recycling program, the Counties required the participation of homeowners to separate recyclables from other wastes, and the assistance of haulers to provide new collection arrangements to deliver recyclables and non-recyclables to the appropriate facility. The Plan did not call for public waste collection to displace existing collection arrangements, or limit private transactions in recyclable materials. It did require the participation of the local hauling industry to conform their services to the new approach. JA 431a-35a.

Since 1990, the public system in Oneida-Herkimer has developed into one of the most successful in New York State. As of 2003, the Oneida-Herkimer system had recycled over 370,000 tons of paper, containers and other materials,

composted 140,000 tons of green waste, and disposed or recycled over 260,000 gallons of liquid hazardous waste. These figures represent more than 1.5 years of regional waste generation diverted from landfills, avoiding $27 million in landfill disposal fees and generating over $14 million in revenue for the public. Over the same period, the Authority provided reliable disposal for 2.3 million tons of waste through contracts procured by competitive bidding in interstate commerce. In addition to the services provided by the Authority's facilities, the system aids local industry through the provision of free waste audits, and also provides extensive public education programs focusing on methods to reduce waste generation and maximize recycling. JA 130a-38a.

The integrated management system is supported by the system charge levied on the non-recyclable fraction of the waste stream. The Authority's recycling, composting, hazardous waste management and industrial waste audit programs are not structured to generate revenue, but to encourage the separation of recyclables, green wastes and hazardous waste for proper disposal. As discussed in detail in the expert report of Dr. Robert N. Stavins, the system charge is intentionally structured to create a differential price for the disposal of non-recyclable waste and recyclables, to serve as an economic incentive for recycling and waste reduction. JA 374a-87a. At $78/ton, it represents the cost of the entire range of Authority services provided to the community. It is not comparable to the market cost for disposal of a ton of waste at facilities that do not offer the bundle of services provided by the Authority.

The system charge is a user fee, which provides additional advantages as a method of financing the waste system. It distributes the costs of the system to the community on the basis of the amount of non-recyclable waste generated by the user. Haulers who use Authority facilities do not absorb

the cost of the system because they pass the disposal charges through to their customers in their bill for collection services. JA 362a. The system charge is a fee for service, and is the most equitable means of distributing the cost of the system to the businesses and residents of the Counties. JA 391a. Because the Authority is organized solely to provide waste services, the system charge is not used to subsidize other governmental programs, and has not served as a revenue source for the Counties.

There is no dispute that the flow control laws operate without differential impact on private disposal service providers, transporters, haulers and buyers of recyclable materials, regardless of their out-of-state or in-state location. The cost of the services provided through the public system is borne entirely by the residents and businesses of the Counties. On review of the record below, the Magistrate Judge, the District Court and the Second Circuit Court of Appeals, each concluded that the laws i) do not discriminate against interstate commerce; and ii) do not place any incidental burdens on interstate commerce that outweigh the substantial public benefits the laws provide as an integral part of the public solid waste management system established for the region.

SUMMARY OF THE ARGUMENT

The decision below should be affirmed. The Oneida-Herkimer flow control ordinances neither discriminate against interstate commerce nor place any incidental burden upon interstate commerce. The ordinances require all haulers and waste generators in the two Counties to deliver waste and recyclables to the Oneida-Herkimer Solid Waste Management Authority — a public system in which the local government has assumed responsibility for waste management.

Under the dormant Commerce Clause, discrimination "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems v. Dep't. of Envtl. Quality*, 511 U.S. 93, 99 (1994). There is no discrimination here. Petitioners concede that in-state and out-of-state waste haulers, processors and transporters are treated alike. The flow control ordinances direct all collections to the publicly-owned facilities, thus they do not favor local private business interests over out-of-state private interests.

The Counties' flow control ordinances are not condemned by *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994). Clarkstown required all waste to be processed at a designated *private* facility, "depriving competitors, including out of state firms, of access to a local market. . . ." *Id.* at 386. Thus, Clarkstown used its regulatory power to favor local enterprise. . . ." *Id.* at 394. Here, no local enterprise is favored.

Oneida-Herkimer mandates participation in a public system in which local government has assumed responsibility for waste management in order to protect public health and preserve natural resources. Assuming *arguendo* that such a non-discriminatory scenario has some incidental effect on interstate commerce, the Oneida-Herkimer ordinances pass the *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) balancing test: "Where [a] statute regulates even handedly to effectuate a legitimate public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142.

The local benefits here are substantial. The flow control laws serve three public purposes that would not be served by private enterprise. First, the laws place the power to make disposal decisions in public hands, allowing the Authority to assume the risks and responsibilities that would otherwise

be carried by the Counties' residents and businesses under modern environmental law. Second, the laws allow the Authority to pursue policies designed to reduce waste and maximize recycling within the Counties in accord with national and state policy. Third, the laws allow the Authority to manage waste through an integrated system of programs and facilities designed to match specific components of the waste stream to the methods that suit them best.

The management of public waste disposal has historical roots. *See* Br. of *amicus curiae* Madison County, New York. For over 100 years, municipalities have performed their traditional duty to control solid waste from the time it is placed on the curb. *See, e.g., Gardner v. Michigan*, 199 U.S. 325 (1905); *Cal Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905). Oneida-Herkimer's laws place the responsibility for waste management with government, not private haulers, allowing the Authority to pursue important policy objectives of waste reduction, recycling and ensuing "the proper disposal of hazardous wastes thereby reducing the counties' exposure to costly environmental tort suits." *United Haulers* II, Pet. App. 20a.

The discriminatory Clarkstown ordinances in *Carbone* relied on the private market to manage local waste; the town's goal was only monetary. Oneida-Herkimer has assumed governmental responsibility to manage local waste; their goal is to protect public interests by preserving and protecting the public health and environment and ensuring compliance with laws designed to achieve those goals.

The Second Circuit doubted that the Oneida-Herkimer ordinances imposed "a differential burden triggering the need for *Pike* analysis." Pet. App. 16a. It declined to resolve the question because "we find it readily apparent that even if we were to endorse the Plaintiffs' claim that the Counties' ordinances burden interstate commerce by preventing the Counties' wastes from being processed by non-local facilities,

the resulting burden would be substantially outweighed by the ordinances' local benefits." Pet. App. 16a. The Petitioners concede that there is no differential impact on any cognizable out-of-state economic interest. No further inquiry is necessary because government regulation that does not differentiate between commerce in one state and another does not burden interstate commerce. The Commerce Clause does not protect "the particular structure or methods of operation in a retail market." *Exxon v. Maryland*, 437 U.S. 117, 127 (1978). Therefore, the claim that the Commerce Clause gives commercial haulers the right to take waste to the disposal facility of their choice is not cognizable. Since all waste collectors are treated alike, Oneida-Herkimer's flow control laws are not unconstitutional.

The decision below should be affirmed.

ARGUMENT

I. The Oneida-Herkimer Laws Do Not Discriminate Against Interstate Commerce, And The *Pike* Balance Is The Appropriate Test For Review

C&A Carbone v. Town of Clarkstown, 511 U.S. 383 (1994) did not establish a new constitutional rule and did not sweep away traditional constitutional distinctions between government service and private sector services, either in the limited field of waste disposal, or in any broader sense. *Carbone* was grounded in established precedent, both under the Court's relatively recent line of "waste cases" commencing with *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) and the older established line of "processing cases" commencing with *Minnesota v. Barber*, 136 U.S. 313 (1890). Because it was so firmly grounded, no new rule of law can be inferred from the application of established law to the facts presented in the case. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 496 (1968) (case does not announce new rule unless it indicates "that the issue involved

was novel, that innovative principles were necessary to resolve it, or that the issue had been settled in prior cases in a manner contrary to the view held by [the Court])."[5]

The question presented here is not how *Carbone* might have been decided if the Clarkstown facility were unambiguously owned and operated by the town, but how the laws of Oneida and Herkimer Counties impact interstate commerce, and how and to what extent they provide benefits to the public. The court of appeals in *United Haulers* I applied established precedent to the facts presented, and properly found that the flow control laws serve non-protectionist purposes and do not discriminate against interstate commerce.

A. There Is No Discrimination Here, Therefore There Is No Commerce Clause Violation

Dormant Commerce Clause analysis is two-pronged: first a determination as to whether the challenged law discriminates against interstate commerce, and if not, whether the law places any incidental burdens on interstate commerce that outweigh the putative local benefits of the law. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

In *Oregon Waste Sys. v. Dept of Envtl. Quality*, 511 U.S. 93 (1994), the Court defined "discrimination" against interstate commerce: "As we use the term here, discrimination simply means differential treatment of in-state and out-of state economic interests that benefits the former and burdens the latter." *Id.* at 99. When a law is found to discriminate against interstate commerce, a rule of virtual *per se* invalidity applies, and the burden then falls on the government to demonstrate under strict scrutiny that the local interest sought to be protected cannot be adequately served by alternative means with a lesser impact on

---

5. *See, also, Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 761 (1995) Kennedy, J., concurring in judgment, citing *Keene Corp. v. United States*, 508 U.S. 200, 215 (1993) (case does not announce new rule where claims are resolved "under well-settled law").

interstate commerce. *Id.* at 99, citing *Chem. Waste Management v. Hunt*, 504 U.S. at 340-41; *Maine v. Taylor*, 477 U.S. 131, 138 (1986). A discriminatory purpose can manifest itself on the face of the regulation, or in its practical effect. *City of Philadelphia v. New Jersey*, 437 U.S. at 626 (1978); *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

Each prong of the Commerce Clause analysis requires comparison of the effects of the challenged law on both in-state and out-of state interests. This comparison in turn requires a preliminary identification of the interests to be compared, in order to determine that they are "similarly situated," so as not to compare "apples to oranges."

> Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities. Although this central assumption has more often than not itself remained dormant in this Court's opinions on state discrimination subject to review under the dormant Commerce Clause, when the allegedly competing entities provide different products, as here, there is a threshold question whether the companies are indeed similarly situated for constitutional purposes.

Gen. Motors v. Tracy, 519 U.S. 278, 298-99 (1997).

Thus, whenever the Court has found that a local regulation discriminates against interstate commerce, it has also found that some entity situated out-of-state is burdened in a different way than a similar entity located within the state. Where a differential burden is involved, the difference must be explained by some justification other than the injured party's state of origin. Specific differential treatment of in-state and out-of state interests has been found in each of this Court's recent waste cases, including *C&A Carbone v. Town of Clarkstown.*

In *City of Philadelphia v. New Jersey*, the State of New Jersey banned all out-of-state waste from its public and private landfills. Suit was brought by private landfill operators within New Jersey who served out-of-state municipalities. The Court found that New Jersey's purpose — to conserve both public and private landfill space within the state — was effected through a discriminatory mechanism. New Jersey targeted out-of-state waste for no reason other than its place of origin. Consequently, the state's residents continued to have New Jersey capacity available, but the burden of the regulation fell upon the residents of other states, who did not. The Court pointed out that the state could have acted to "slow the flow of *all* waste into the State's remaining landfills, even though commerce might be incidentally affected." *Id.* at 626. Thus, a general reduction in the commerce in waste (which is the object and effect of the Oneida-Herkimer regulations), would not have constituted discrimination for the *Philadelphia* court. Moreover, while the regulation extended to both public and private landfills, the Court pointedly expressed no opinion about "New Jersey's power, consistent with the Commerce Clause, to restrict to State residents access to state-owned resources," 437 U.S. at 627 n.6, recognizing the ability of public systems (such as Oneida-Herkimer) to limit service to their own region.

In *Fort Gratiot Sanitary Landfill v. Michigan*, 504 U.S. 353 (1992), the court struck a Michigan statute that prohibited private landfills from accepting waste generated outside of Michigan. Again, the state was attempting to conserve Michigan's private landfill capacity for Michigan residents, but did so without identifying any reason why out-of-state waste should be treated differently than local waste. Again, the burden of the regulation fell upon the residents of other states. The court expressly stated that "the case did not raise any question concerning policies that municipalities may pursue with respect to publicly owned facilities." *Id.* at 358-59.

City of Philadelphia and *Fort Gratiot* each represented attempts by states to preserve local disposal capacity by direct bans of out-of-state waste. *Chem. Waste Management v. Hunt*, 504 U.S. 334 (1992) and *Oregon Waste Sys. v. Oregon Dept. of Envtl. Quality*, 511 U.S. 93 (1994) represented attempts by states to slow the flow of waste into private facilities in Alabama and Oregon. The method adopted in each case was an assessment of fees on out-of-state waste at rates different from the fees assessed on in-state waste. In these cases the burden of the assessed fees fell disproportionately upon the shippers of out-of-state waste (and indirectly upon out-of-state generators) without an acceptable justification that out-of-state waste posed greater problems for the state than in-state waste. The differential treatment of out-of-state waste could not be justified for any reason other than the origin of the waste. Significantly, in *Chem. Waste Management* the differential fee was struck down, but Alabama regulations reducing the total intake of hazardous waste into the subject facility — without differentiating between in-state and out-of-state sources — were allowed to stand. *Id.* at 342-46.

In *Carbone*, two flaws in the Clarkstown scheme were identified. The first was the application of Clarkstown's ordinance to the Carbone processing facility, which was engaged in accepting New Jersey waste for ultimate disposal in Indiana. This had the effect of burdening residents of New Jersey with higher costs than they would otherwise have paid. *Carbone*, 511 U.S. at 388-89. As in *Philadelphia*, *Fort Gratiot*, *Oregon Waste and Chem. Waste Management*, the burden of the regulation was shifted to people outside of the state.

The second flaw in the Clarkstown scheme was the direction of Clarkstown's waste to a "single local proprietor," *Carbone* at 392, which in Clarkstown's case, was the privately operated transfer station designated in the ordinance. The court found this aspect of the arrangement

unconstitutional because the town denied access to the local waste market to both Carbone and other "rival businesses" of the Clarkstown facility. *Id.* at 394. The burden on interstate commerce due to the designation of a single local proprietor was to favor that particular proprietor and disfavor all others, including competing facilities located out-of-state.

Neither of the flaws identified in the Clarkstown scheme are present here. In Oneida-Herkimer, the laws do not apply to waste generated outside of the Counties, and there is no burden shifted to the residents or waste generators in other states. As the courts below found, the entire financial burden of the Oneida-Herkimer system, as implemented by the local laws, falls on the residents and waste generators of the Counties.[6] There is no interference with any regulatory regime in any other state, or in any other county within New York State, that would either increase the costs or limit the disposal options of any person outside of Oneida and Herkimer Counties.

Petitioners argue that the unconstitutional favoritism to the "single local proprietor" in *Carbone* should be equally unconstitutional whether the favored entity is a privately-operated facility or an unambiguously public facility. This reading assumes that the Court adopted the proposition that there is no difference between public and private facilities that handle solid waste, and that there is, or should be, no constitutional distinction between the public sector and the private sector for Commerce Clause purposes. This is not

---

6. As noted in the expert report of Dr. Robert Stavins and confirmed in depositions of the plaintiffs, the practice of the waste collection industry is to pass disposal costs, as well as other operating costs, through to the consumers of collection services. While Dr. Stavins recognized the possibility that some cost of compliance with the laws might not be passed through, or might be borne by residents of neighboring counties, there was no evidence presented that any such costs would be of a non-trivial nature, or would extend to other states. JA 360a-63a.

stated in the decision,[7] and the Court should not adopt such a proposition now.

B. The Public Purposes Served By Oneida-Herkimer Distinguish This Case From Carbone

An examination of the different purposes of the Clarkstown and Oneida-Herkimer laws reveals the constitutional distinction. Clarkstown's arrangement with its operator was not public management. The Oneida-Herkimer system is publicly managed.

The Oneida-Herkimer laws serve three public objectives that were not served by Clarkstown's ordinance. First, the purpose of the Oneida-Herkimer laws is to place the power to choose how the public's waste is to be managed in the hands of local government, and to take that decision-making power out of the hands of private haulers and processors. Second, the laws allow the Authority to pursue policy objectives of waste reduction and recycling, which are antithetical to private sector waste interests, and uniquely governmental. Third, the laws allow the Authority to employ methods of waste management, including a variety of technical, administrative and economic tools, which are

7. The language of the majority opinion in *Carbone*, which the court of appeals in *United Haulers* I described as "elusive" (Pet. App. 45a), does not resolve the issue. The majority characterized the town's purpose in adopting the law as a means to finance "its new facility" *id.* at 387, and "its project" *id.* at 394, in the sense that the town's right to possess the facility would come about with the exercise of a right to purchase the facility for $1 after the end of five years. *Id.* at 387. The majority refers to the designated transfer station as a "town-sponsored facility" *id.* at 393, as a "favored local operator" *id.* at 389, a "favored operator" *id.* at 391, as "the preferred processing facility," a "single local proprietor" and "local business" *id.* at 392, but never describes it as a public facility. Justice O'Connor's concurring opinion describes it as the "town-authorized facility" *id.* at 402. The dissent characterizes it as "a single processor" which is "essentially an agent of the municipal government." *Id.* at 416.

uniquely effective and also uniquely governmental. All three are non-protectionist, non-discriminatory public purposes.

1. The First Objective: Public Assumption Of Environmental Risk On Behalf Of The Community

The Counties, and communities across the nation, were facing a failed waste management system in the 1970's and 1980's. The Congress enacted the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §6901, *et seq.*, and the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601, *et seq.*, changing the paradigm for environmental responsibility, and making generators of waste liable for the costs associated with improper disposal. Oneida and Herkimer Counties recognized this new paradigm, and acting in their role "as guardian[s] and trustee[s] for [their] people" *Reeves v. Stake*, 447 U.S. 429, 438 (1980), the Counties established a new public disposal system to interpose local government between their citizens and the environmental liabilities associated with waste generation and disposal.

Petitioners argue that the public disposal system in Oneida-Herkimer burdens interstate commerce by denying the private sector the ability to offer low cost disposal to Oneida-Herkimer waste generators. Pet. Br. 11. The argument essentially rests on a single assertion: "When in-state generators hire commercial haulers to remove their waste, the waste enters interstate commerce." *Id.* at 49. Because the laws deny the haulers the ability to seek out the lowest cost disposal available in the market place, the argument runs, the "economic viability" of out-of-state facilities is threatened. *Id.* at 16-17. Neither argument has merit.

First, as Petitioners concede, the alleged threat to the economic viability of out-of-state facilities is fully shared by all in-state facilities. There is no differential treatment of

either, and hence no discrimination against interstate commerce. *See Oregon Waste Sys., supra.*

Second, the premise is simply wrong. Oneida-Herkimer generators have not hired commercial haulers to dispose of their waste; they have only hired them to collect it. In the absence of flow control, commercial haulers would seek low-cost disposal options without consulting their customers. To gain control of disposal, generators in Oneida-Herkimer elected legislators to make disposal decisions on their behalf. Here, the generators' message to their haulers is: take the waste to the public system.

This first primary objective of the laws — that regional waste must go to public, not private, facilities for processing and disposal — is the foundation for the court of appeals' finding, in *United Haulers* I, that the laws do not serve a protectionist purpose and do not discriminate against interstate commerce. "Not only are such regulations 'less likely to be protectionist' [when they direct waste to public facilities] they are less likely to give rise to retaliation and jealousy from neighboring states." Pet. App. 48a.

The public system at work in Oneida and Herkimer Counties is distinguishable from the hasty arrangement made by Clarkstown with its private transfer station operator. The key difference is Oneida-Herkimer's affirmative assumption of responsibility for disposal of the public's waste, reflected in its comprehensive plan for programs and facilities, its direct receipt of waste and recyclables, its receipt of the fees paid by the public, and its presence as a party in all of the subsequent transactions with vendors, transporters, disposers, and buyers of recycled materials, with the attendant risk and legal liability that accompanies the provision of service. Clarkstown avoided taking responsibility for disposal of its citizens' waste.

In Oneida-Herkimer, the necessity for the assumption of governmental responsibility for waste disposal was prompted by the sweeping changes in American environmental law and policy since 1976. With the adoption of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §6901, *et seq.*, and the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601, *et seq.*, broad new responsibilities and liabilities were created for generators of solid and hazardous wastes, including municipalities, small businesses and individuals. RCRA provided for the systematic identification of toxic and hazardous substances by federal and state officials, together with new methods for their management. CERCLA provided harsh new liabilities for the improper disposal of wastes, including strict, joint and several liability for investigation, clean-up and remediation costs.

"The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the cost of clean-up." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21 (1989) (emphasis in original); *United States v. Best Foods*, 524 U.S. 51, 56 (1998). These liabilities extend to whole classes of transporters and "arrangers,"[8] who could be ordinary citizens and small businesses whose wastes find their way to contaminated sites. CERCLA liability has been held to attach not only to hazardous wastes regulated "cradle to grave" under RCRA, but to ordinary municipal solid wastes that contain hazardous substances, even in trace amounts.[9] Generators are

8. CERCLA, 42 U.S.C. §9607(a)(3) provides that "persons who have arranged for disposal . . . , or arranged with a transporter for transport and disposal" are liable for those hazardous substances they owned or possessed."

9. *See St. Paul Fire and Marine Ins. Co. v. Warwick Dyeing Corp.*, 26 F.3d 1195 (1st Cir. 1994); *BF Goodrich v. Murtha*, 958 F.2d 1192, 1202 (2d Cir. 1993); *Alcan Aluminum Corp. v. United* (Cont'd)

equally responsible, with transporters and the owners of contaminated sites, for the environmental injuries caused by improper disposal. Generators do not escape this liability when they hire commercial haulers. To the contrary, CERCLA prompts generators to take greater control over the decisions involved in waste disposal.

These laws were applied in Oneida and Herkimer Counties with the designation of several local landfills as inactive hazardous waste sites under New York Law,[10] and the commencement of CERCLA litigation involving hundreds of local defendants to remediate a National Priorities List (Superfund) site in Oneida County. JA 447a-52a, 472a-78a. As these environmental threats were identified, the community recognized that waste disposal decisions were too important to be made by their trash haulers. They called for a new public agency to assume responsibility.

Petitioners and their *amici* characterize the Counties' environmental concerns as "misguided," Pet. Br. 19 and "flawed," NSWMA Br. 23, pointing out that "If a commercial hauler were to pick up waste from a business or residence and then bring it to a processing or disposal facility unconnected with the Counties, respondents never would come into possession of the waste and would not have any liability for it." Pet. Br. 19. This observation is true, but it entirely misses the point of the Counties' system and laws. The Counties and the Authority are taking possession of the region's waste in order to reduce the exposure of their

---

(Cont'd)

States, 964 F.2d 252, 260-61 (3d Cir. 1992); *United States v. Cello-Foil Products, Inc.*, 100 F.3d 1227 (6th Cir. 1996); *United States v. Northeastern Pharmaceutical & Chem. Co., Inc.*, 810 F.2d 726 (8th Cir. 1986); *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313 (11th Cir. 1990).

10. N.Y. Envtl. Conserv. Law §§ 27-1301-27-2403.

residents and businesses to environmental liability. The public placed the disposal choice in the hands of their government precisely because they believed they could better avoid exposure to liability through a public system than by leaving the decisions with commercial haulers.

Clarkstown, in contrast, did not take possession of its citizens' waste. Instead, it commanded its citizens to deal with a private entity for waste service, and promised only that if the operator did not receive sufficient revenue through the transactions forced by the law, the town would make up any shortfall. *Carbone* at 387. The operator, in turn, enjoyed a private monopoly for five years, allowing the town to sit on the sidelines until the passage of time would allow it to claim the operator's facility. If the operator were to deliver Clarkstown waste to an environmentally-unsafe facility, the residents of Clarkstown could be exposed to liabilities as "arrangers" under CERCLA because their transaction with the operator sent the waste on its way. But the town would avoid exposure to those liabilities because it avoided taking possession of the waste. Pet. Br. 19.

The Court recognized in *Carbone* that Clarkstown "elected to use the open market to earn revenues for its project" when it granted the private facility an exclusive right to receive local waste in exchange for the deferred receipt of a transfer facility, *id.* at 394. Unlike the fees charged by the Authority for its services, the citizens' fees in Clarkstown went to the operator. Because the Clarkstown arrangement relied on the private operator to manage local waste, it was properly prohibited from employing "discriminatory regulation to give that project an advantage over rival businesses from out-of-state." *Id.* at 394.

The assumption of the responsibility and potential liabilities associated with waste management is a traditional governmental function. The process undertaken by the Counties and the Authority to establish a public system, and

then to craft a Plan stating its objectives and management methods, was an exercise of democracy, taken after months of public hearings and discussion. As a result of this process, the Authority and the Counties identified the essential facilities necessary to provide the beginnings of an integrated system, and then issued over $55 million in public bonds to begin construction. Pet. App. 27a. Clarkstown made no capital investment in waste management.

2. The Public System In Oneida-Herkimer Does Not Compete With Private Sector Services

Another flaw in Petitioners' argument is the false notion that the Counties' system competes with services offered by the private sector. The role of the Authority in Oneida-Herkimer is not comparable to the roles played by the "rival" private processing facilities in Clarkstown.

The Clarkstown ordinance was enforced against the Carbone processing facility, directing it to deliver waste generated in New Jersey to the Clarkstown facility after it had been received and processed by Carbone. The Oneida-Herkimer laws would not have this effect. The laws are applicable solely to haulers and generators within the Counties, and do not regulate private processing facilities, landfills or other disposal facilities. If the Carbone facility were located within Oneida or Herkimer Counties, the laws would not prevent its operation, or its acceptance of waste from other states or local sources. The Oneida-Herkimer laws would prevent local haulers and generators from delivering to it, but it would not be subject to prosecution for accepting local waste. No hauler in Oneida-Herkimer is prevented from collecting waste outside of the Counties and delivering it anywhere, including a private facility located within the Counties.

The Authority provides disposal service only to the citizens of Oneida and Herkimer Counties, to whom it owes

a governmental responsibility.[11] In fulfilling its governmental responsibility within the Counties, the Authority does not compete with private disposal services located in other states or elsewhere in New York. Any competition between the Authority and the private sector could only occur if the Authority were to offer service to persons to whom it does *not* have a governmental responsibility, such as residents of other jurisdictions. But because the Authority does not accept waste from areas outside of the Counties, it does not compete with other disposal service providers in those markets either.

3. The Market Participant Doctrine Does Not Apply In This Action By Appellant Haulers, And Any Indirect Regulatory Effect On Non-Parties Is Not Discrimination Against Interstate Commerce

The Counties and the Authority do not raise the market participant doctrine as a defense against the claims of the haulers. The doctrine applies to non-regulatory activities that "fall outside of the scope of activity governed by the dormant Commerce Clause." Pet. App. 11a-12a. As to the appellant haulers, the market participant doctrine is simply not an issue in this case, because the Counties and the Authority do not claim that the haulers are not regulated by the flow control laws.

In *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1984), the Court found that the restraints of the dormant Commerce Clause do not apply to the actions of states when they act as participants in commercial markets, and not as regulators of those markets. In *South Central Timber v. Wunnicke*, 467 U.S. 82 (1984), the Court made clear that the market participant doctrine allows a state to impose burdens on commerce in the markets in which it participates, but not

11. The Authority is obligated to provide services to the citizens of the Counties, and precluded from accepting waste generated elsewhere. *See* N.Y. Pub. Auth. Law § 2049-ee(7) (McKinney 2006).

in "downstream" markets where it exercises government power as a regulator. *Id.* at 95.

The Petitioners argue here, as they argued below, that because the Authority is a participant in the disposal marketplace, it cannot use its regulatory power to favor its own facilities at the expense of interstate commerce. App. Br. 33-37. This is not a correct statement of the doctrine. The market participant cases do not prohibit regulations that favor public facilities. They prohibit municipalities from regulating *and also* claiming immunity from commerce clause scrutiny as market participants.

These laws unquestionably regulate the conduct of the haulers in directing them to deliver to public facilities. The establishment of a public disposal system is also the act of a sovereign. The Counties do not claim any exemption from the strictures of the Commerce Clause in adopting and enforcing the local laws that place disposal power in government hands. The Counties regulate the haulers, but do not discriminate or otherwise burden interstate commerce.

Had this case been brought by a private landfill, the Authority might rely upon the market participant doctrine to defend its right to choose other landfills for disposal of Oneida-Herkimer waste from 1991-2006, or to cease trading with all private landfills after 2007. As the court of appeals found in *United Haulers* II, the Authority does indeed participate in the marketplace "as any other economic actor would when, after having employed its regulatory powers to compel delivery of the waste . . . to its processing facilities, it contracts with private parties to deliver its processed wastes to landfill sites that meet its requirements."[12] But because the Authority does not employ any uniquely governmental

12. *See* Br. of *amicus curiae* National Association of Counties at 19-22 for a response to petitioner's reliance on the market participant doctrine.

power to regulate those with whom it does business, "the outcome of its bidding process is simply not a concern of the Commerce Clause." Pet. App. 12a.

The flow control laws do not apply to landfills or other disposal facilities, and no out-of-state landfill or other disposal facility is a party to this case. But even if the Court were to consider the operation of the public disposal system as a kind of "downstream" regulation of private landfills, such an effect does not violate the Commerce Clause. As the courts below found, nothing in the Authority's procurement policies operated to favor in-state entities over out-of-state entities in the selection of landfills for regional waste during the 1991-2006 period. In using its new public landfill from 2007 forward, the Authority is withdrawing from the commercial market altogether, which denies waste to in-state and out-of-state landfills alike. Moreover, the removal of regional waste from both intrastate and interstate commerce is at most an "indirect" effect on interstate commerce, reviewable under the balancing test of *Pike. Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986).

4. Waste Reduction And Recycling Are Unique Governmental Purposes Consistent With National And State Policies

The second governmental objective served by the laws is the pursuit of established state and federal solid waste policy. The objective of the Counties' Final Local Solid Waste Management Plan "is to provide for maximum levels of waste reduction and recycling, coupled with the development of environmentally and economically sound programs and facilities for the remainder of the waste stream." JA 144a. This objective is in accord with the statutory policy of the State of New York, which establishes four state-wide management priorities:

> First, to reduce the amount of solid waste generated;
>
> Second, to reuse material for the purpose for which it was originally intended or to recycle material that cannot be reused;
>
> Third, to recover, in an environmentally-acceptable manner, energy from solid waste that cannot be economically and technically reused and recycled; and
>
> Fourth, to dispose of solid waste that is not being reused, recycled or from which energy is not being recovered, by land burial or other methods approved by the department.

N.Y. Envtl. Conserv. Law §27-0106(1) (McKinney 2006).

National policy in waste management has the same priorities. RCRA provides:

> The objectives of this chapter are to promote protection of health and the environment and to conserve valuable material and energy resources by providing technical and financial assistance to state and local governments and interstate agencies for the development of solid waste management plans (including resource recovery and resource conservation systems) which will promote improved solid waste management techniques (including new more effective organizational arrangements), new and improved methods of collection, separation, and recovery of solid waste, and the environmentally safe disposal of non-recoverable residues. . . .

42 U.S.C. § 6902(a).

These statutes all call for change in the way the nation, the states and local communities manage their wastes. The new approaches called for by RCRA included not only innovations in technology, but changes in the disposal habits of ordinary citizens, and in the customs and practices of the waste industry.

RCRA expected that "the collection and disposal of solid waste should continue to be primarily the function of state, regional and local agencies . . ." 42 U.S.C. §6904(a)(4). It is not necessary for states and local governments to secure special authorization from Congress to provide solid waste services to their citizens. Congress expected state and local agencies to exercise their sovereign powers.[13] The Commerce Clause requires those powers to be exercised in a non-protectionist, non-discriminatory manner. This Court has long recognized that government regulation "for the purpose of protecting the health of its citizens-and not simply the health of its economy-is at the core of its police power." *Sporhase v. Nebraska*, 458 U.S. 941, 956 (1982). The Oneida-Herkimer laws, like the waste policies of the state and federal governments, were adopted to protect health and the environment. They are not protectionist.

The citizens of Oneida-Herkimer endorsed these non-protectionist policies through their participation in the extensive process undertaken by the Authority to identify the elements of the public system and prepare the Local Solid Waste Management Plan.[14] The people contributed to the creation of a waste system that would require them to pay "more than twice as much as they had paid for waste disposal

---

13. *See* Br. of *amicus curiae* Onondaga County Resource Recovery Agency, et al., for discussion of the police power and RCRA, 42 U.S.C. §6901, et seq.

14. Clarkstown, unlike Oneida-Herkimer, was not a designated planning unit under New York law. N.Y. Envtl. Conserv. Law §27-0107(1)(a).

services prior to the adoption of the flow control laws." Pet. App. 48a. The planning process shows that there are "major in-state interests adversely affected" by the laws, which this Court has recognized are "a powerful safeguard against legislative abuse" and indicative of non-discriminatory purposes. *West Lynn Creamery Inc. v. Healy*, 512 U.S. 186, 200 (1994).

Oneida-Herkimer's objectives — to shield their citizens from environmental liability and to focus their waste policies on the reduction and recycling of local waste — are uniquely governmental, flowing from the sovereign power of the State of New York, and protected by the 10th Amendment to the Constitution. As this Court remarked in *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905), "it may be taken as firmly established that the States possess, because they have never surrendered, the power . . . to prescribe such regulations as may be reasonably necessary and appropriate for the protection of the public health and comfort." *Id.* at 318. *See* Br. of *amicus curiae* State of New York, et al.

Because these objectives are not protectionist, and in the absence of any evidence of "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter," *Oregon Waste Sys.*, 511 U.S. at 99, the court of appeals correctly found that the laws do not discriminate against interstate commerce, and that the *Pike* balancing test was the proper standard to employ in assessing any incidental burdens that the laws placed upon interstate commerce.

II. The Oneida-Herkimer Laws Pass The Balancing Test Of *Pike v. Bruce Church*

A. The Laws Place No Cognizable Incidental Burden On Interstate Commerce

No evidence of differential treatment to any specific out-of-state interest was offered by Petitioners in *United Haulers* I, but the court of appeals remanded the matter anyway for "discovery and further argument by the parties, which will undoubtedly assist the district court in this fact intensive determination." Pet. App. 52a. Detailed examination of the effects of the laws on the various in-state and out-of-state entities followed in the district court. The entities examined included generators of wastes, haulers such as the plaintiffs, transporters, processors, landfills and other service providers, together with the regulatory interests of governmental agencies in other states. There was no evidence that any of these classes of interests were treated differently by the laws due to their in-state or out-of-state character. Pet. App. 66a-67a. The Petitioners conceded in discovery that they did not even contend that there is any greater burden placed upon an out-of-state entity by the laws than on a similarly situated in-state entity. JA 350a. The record in the courts below confirms this undisputed fact. Pet. App. 89a-100a, 66a-68a.

Examination of the patterns of commerce in waste after creation of the Authority's system also revealed no discriminatory effects on interstate interests. From an economic perspective, the report of Dr. Stavins established that the Authority's early decision to construct the first major transfer station in the region actually lowered the cost of transporting non-recyclable waste from Oneida-Herkimer into interstate commerce, commenced such shipments earlier than would otherwise have occurred, and sent greater tonnages into interstate commerce than would otherwise have occurred. JA 363a-69a. For recyclable materials, the laws' source separation requirements have facilitated a high level

of recycling and have sent several hundred thousand tons of recyclables to markets, many of them in interstate commerce. JA 359a.

Despite the absence of any differential impact on out-of-state interests, or indeed, *because of* this lack of evidence, Petitioners argue that an even-handed regulation cannot, by definition, have any materially-different impact on an out-of-state interest compared to an in-state interest. According to their argument, if any differential impact is present, no matter how slight, the regulation discriminates against interstate commerce and the rule of "per se" invalidity should apply. Pet. Br. 46-47. Therefore, Petitioners claim, the court of appeals misconstrued the balancing test of *Pike v. Bruce Church*, 397 U.S. 137 (1970). Their argument is baseless.

This Court has never demanded that state and local regulation display a faultlessly perfect balance of in-state and out-of-state burdens. The court has always recognized that regulations can be "even-handed" and still have different effects on out-of-state and in-state commerce. "When a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). Indeed, the Court has always recognized that there is "no clear line" between a discriminatory and an incidental burden on interstate commerce. *Carbone*, O'Connor, J., concurring at 402. "In either situation, the critical consideration is the overall effect of the statute on both local and interstate activity." *Brown-Forman*, 476 U.S. at 579.

Here, the overall effect of the flow control laws on both local and interstate activity is to reduce the commerce in disposal services for non-recyclable waste, and to increase the commerce in recyclable materials. The Report and

Recommendation of the Magistrate and the Decision of the District Court each held that no incidental burden on interstate commerce was established because Petitioners could not show any qualitative or quantitative difference in the treatment of in-state and out-of-state interests under the laws. Because no incidental burden was shown, it was unnecessary to engage in a balance of non-existent burdens against the obvious benefits the laws provided to the public. Pet. App. 66a-73a, 95a-99a.

In *United Haulers* II, the court of appeals considered the Petitioners' argument that the burden on commerce consisted of the withholding, or "hoarding," of waste from intrastate and interstate markets, even without a showing of differential impacts. Pet. App. 13a. The court of appeals declined to decide whether such a withholding constitutes a cognizable burden, but held that if that effect was a burden, it was slight in comparison with the substantial benefits afforded by the laws. Pet. App. 16a.

In substance, the Petitioners' argument on the "withholding" or "hoarding" of waste is that because the laws have the effect of reducing the amount of waste in commerce (both intrastate and interstate), there is a burden created, characterized as an "export barrier" that the dormant Commerce Clause should prohibit. This Court's dormant Commerce Clause jurisprudence requires rejection of this theory for two reasons.

First, the Commerce Clause has never been construed to prohibit fair, across-the-board regulation of commerce that has the effect of reducing the amount of trade in a given commodity. In *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), the Court upheld Indiana regulations governing takeovers of Indiana corporations, rejecting the argument that the dormant Commerce Clause was violated because the law tended to reduce the number of transactions made.

> Dynamics' argument that the Act is unconstitutional ultimately rests on its contention that the Act will limit the number of successful tender offers. There is little evidence that this will occur. But even if true, this result would not substantially affect our Commerce Clause analysis. We reiterate that this Act does not prohibit any entity-resident or nonresident-from offering to purchase, or from purchasing, shares in Indiana corporations, or from attempting thereby to gain control.

Id., 481 U.S. at 93.

Government frequently regulates with the intention of reducing commerce in goods and services. Regulations prohibiting certain forms of advertising for cigarettes are unquestionably intended to reduce the nation's consumption of tobacco, but they are not unconstitutional. Regulations banning the sale of lead in gasoline and paints undoubtedly have an adverse effect on the nation's commerce in lead, but they do not offend the Commerce Clause. These kinds of regulations are valid because they regulate all commerce in the commodity, and do not distinguish between commerce in one state and another.

The second reason that Petitioners' argument must fail is that it would use the Commerce Clause to shore up the old structure of the waste markets, in order to protect the position of low-cost landfills in those markets.[15] These low- cost facilities compete with other disposal technologies that may offer, for example, greater environmental protections at higher cost. Their interests do not coincide with the kinds of innovation in management that the Authority represents. The

---

15. *See* Pet. Br. 11 "The ordinances . . . bar [] patronage of out-of-state facilities that offer-those services at lower prices. NSWMA Br. at 20. Sussex Br. at 9.

BEST AVAILABLE COPY

landfills have allied themselves here with local haulers who are responsive to the attractions of low-cost disposal.[16]

This partnering of haulers with low-cost landfills enjoys no special constitutional protection. The old structure of waste markets relied almost exclusively on disposal by haulers in dumps and landfills. RCRA was adopted to change that structure by encouraging recycling and energy recovery at the expense of land disposal. In Oneida-Herkimer from 1991-2006, the Authority supplanted the haulers as the purchaser of landfill service, for a diminished amount of non-recyclable waste, reduced by the Authority's recycling and reduction programs. While landfills, as a class of disposal facilities, may receive less waste from local haulers than they might otherwise receive due to the success of national, state and local recycling policies, the Commerce Clause does not protect them from changes in market conditions — even where the changes are prompted by regulation.

This Court has made it clear that the Commerce Clause does not protect "the particular structure or methods of operation in a retail market." *Exxon v. Maryland*, 437 U.S. at 127; *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. at 93. "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon*, 437 U.S. at 126. These principles have special significance here because the protections Petitioners seek would block government efforts to reduce the public's exposure to environmental liability, and frustrate national waste policies that encourage innovative approaches to waste management.

---

16. In depositions, the haulers testified that their likely choice of out-of-county disposal sites would be dictated solely by cost, and that in-state, rather than out-of-state landfills would be preferable due to the cost of transportation. JA 364a, n.12.

Finally, Petitioners' concede that a public waste system that includes public collection as well as disposal service is constitutional. Pet. Br. 48-49. The Counties surely could institute public collection and completely displace the private hauling industry.[17] But such an action would be both wasteful and unnecessary, as the Counties' interest is in proper disposal, not in putting the region's commercial haulers out of business. Moreover, it is hard to see why this broader waste service monopoly would not offend the Commerce Clause to a greater extent than the less intrusive regulation of flow control. With public collection, the government would still be able to direct local waste to its own facilities, the economic interests of private disposal facilities would be equally threatened, and any other burdens placed on interstate commerce by a public disposal system would be unchanged.

The Petitioners' interests and those of their *amici* are at odds when it comes to collection. The Oneida-Herkimer laws do not threaten the haulers' livelihoods. Not every hauler in Oneida and Herkimer Counties is willing to support Petitioners' view that the Commerce Clause denies government the power to control disposal of waste unless it also exercises its power to collect. *See* Br. *amicus curiae* Mohawk Valley EDGE.

Because there is concededly no differential impact on any out-of-state economic interest affected by the laws, and because the particular low-cost business arrangement advocated by the haulers is not protected by the Commerce Clause, there is, in

17. The power to provide public waste collection services is granted to New York's county governments Section 119 of the New York General Municipal Law. N.Y. Gen. Mun. Law §119 (McKinney 2006). The Authority is granted the power to provide collection services by New York Public Authorities Law Section 2049-ee(4). N.Y. Pub. Auth. Law §2049-ee(4). Where public collection is instituted, municipalities may contract with private haulers to perform the service, and direct them to specific disposal facilities pursuant to the contracts. *U.S.A. Recycling v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995).

fact, no incidental burden placed upon interstate commerce by these laws. Under these circumstances, several courts of appeals are in agreement with the district court that logic does not require any further inquiry, or comparison of the benefits of the flow control laws to non-existent burdens.[18]

Nevertheless, if one examines the benefits here, all doubt is erased.

B. The Counties' Integrated System Of Waste Management Provides Benefits Possible Only Through Flow Control

The third governmental purpose of the flow control laws is integrated management. The laws divide the waste stream into component parts and direct each component to a facility best suited to recover useful commodities, or dispose of it in the most environmentally-sound manner. The Authority operates eight different facilities to receive, process and dispose of the region's waste, all of which operate in concert to fulfill the Solid Waste Management Plan's commitment to the maximization of waste reduction and recycling. The effectiveness of this integrated management system is no longer challenged by the Petitioners. The particular benefits of each of the Authority's recycling, composting, hazardous waste and landfill facilities and programs are set forth at length in the Joint Appendix and need not be restated here. JA 115a-39a, 353a-95a, 419a-31a.

---

18. *Nat'l Paint & Coatings Association v. Chicago*, 45 F.3d 1124, 1132 (7th Cir. 1995) "No disparate treatment, no disparate impact, no problem under the dormant commerce clause." *Old Bridge Chem., Inc. v. New Jersey Dep't of Envtl. Protection*, 965 F.2d 1287, 1295 (3rd Cir. 1992); *Nat'l Solid Waste Management Assoc. v. Pine Belt Regional Solid Waste Auth.*, 389 F.3d 491, 502 (5th Cir. 2004); *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1015 (9th Cir. 1994); *New York State Trawlers Assoc. v. Jorling*, 16 F.3d 1303, 1308 (2nd Cir. 1994); *V-1 Oil Co. v. Utah State Dep't of Public Safety*, 131 F.3d 1415, 1425 (10th Cir. 1997).

However, two particular benefits of the flow control laws should be emphasized. First, the application of different technologies to different components of the waste stream is possible only through a system of regulation. The flow control laws establish a uniform set of rules to govern the disposal practices of all waste generators and haulers in the region, defining the categories of waste that can be recycled, composted or consigned to land disposal. Uniform participation by generators provides a stable foundation to the system, allowing the Authority to introduce new services as technologies and markets develop. Regulation of haulers ensures that the collection industry participates in the Solid Waste Plan to the same extent that generators participate, delivering to the same facilities and paying the same charges.

Private market forces could not produce this community-wide participation or achieve the high levels of recycling and environmental awareness obtained through integrated management. Only government involvement and the application of the flow control laws makes it possible. *See* Stavins, JA 374a-78a.

Second, the flow control laws make it possible for the Authority to provide the integrated "bundle" of benefits through the system charge on non-recyclable waste. This $78/ton charge delivers not only landfill transportation and disposal, but recycling, composting, household hazardous waste disposal and all of the other program benefits provided by the system. The system charge makes it possible for the Authority to accept recyclables and household hazardous wastes without charging a fee for those materials, and at the same time, provide an incentive to businesses and individuals to reduce their generation of non-recyclable waste. As Dr. Stavins pointed out, "Flow control makes possible financial incentives for waste reduction and recycling that are unachievable through other means." JA 388a-92a.

Private markets could not provide these benefits. Only government regulation makes it possible to provide a variety of waste services that are not structured to generate revenue, and at the same time distribute the cost of the entire system according to the amount of non-recyclable waste an individual user generates. JA 381a-82a, 388a-91a.

The haulers ask the Court to compel Oneida-Herkimer to allow them to take non-recyclable waste to anywhere they might find a lower price. This would require the Authority to "unbundle" its package of benefits, and lose many of the benefits altogether. For example, if haulers were allowed to take waste out of the Counties, the Authority would not be able to insist upon higher environmental standards at private landfills elsewhere, because, as the Court pointed out in *Carbone*, a local government regulating private transactions may not exercise its police power beyond its borders. *Id.* at 393. As discussed above, restoring the decision-making power over disposal to the haulers would expose local generators to liabilities arising from poor choices made by the haulers.

Without flow control and the system charge, the Authority would not be able to accept recyclables, green wastes and household hazardous wastes at no charge, and the substantial incentives for recycling and waste reduction would be lost. From an administrative point of view, the Authority's ability to enforce the recycling provisions of the laws would be lost, because there would be no means to inspect loads of waste bound for private landfills for the presence of recyclables. Most importantly, without the flow control laws there would be no means to mandate the participation of either haulers or generators in the Counties' solid waste plan, and no possibility that the federal, state or local waste reduction and recycling objectives could be met.

As the court of appeals observed in *United Haulers* II, the benefits of the system are intrinsically tied to the laws.

> We agree with plaintiffs that some of these goals, particularly those relating to revenue generation, also might be achieved through other instruments of municipal policy. However, nothing in the record before us demonstrates, or even suggests, that the Counties could address their liability concerns or encourage recycling across the wide range of waste products accepted by the Authority's recycling program in any other way, let alone through an approach as straightforward as the use of flow control.

Pet. App. 20a.

C. Widespread Adoption Of Flow Control Similar To Oneida-Herkimer's Laws Would Not Burden Interstate Commerce

If other communities were to adopt flow control laws similar to those of Oneida-Herkimer, Petitioners and their *amici curiae* forecast doom to an interstate trade in waste that is based upon low-cost disposal. But the size of the private interstate market in waste is dwarfed by the far larger intrastate market, and the public's own investment in waste infrastructure. According to Petitioners' own figures, 60% of all disposal facilities in the United States are publicly owned, NSWMA Br. 7, and more than 90% of the nation's waste is disposed of before it crosses any state lines. JA 240a. The interstate trade in waste services is unlikely to suffer any injury at all if laws and public systems like Oneida-Herkimer's become the norm.

The potential effects of the adoption of similar flow control laws and systems by other municipalities were the subject of expert testimony examined by the courts below. Dr. Stavins established that with the adoption of flow control

and the Authority's construction of the first major transfer station in the Oneida-Herkimer region, interstate shipment of waste from the region occurred earlier, and involved larger quantities of waste, than would have been the case if the private sector had been free to act on its own. JA 360a-69a.

Moreover, Dr. Stavins also pointed out that the widespread adoption of flow control, as implemented in Oneida-Herkimer, would almost certainly *increase* the interstate trade in waste. Municipalities do not find any assistance from flow control in siting landfills or other disposal facilities within their borders. With flow control, densely populated municipalities would be far more likely to build transfer facilities to assist in the export of waste, and the transfer stations they build would facilitate greater interstate shipment of waste at the expense of intrastate shipment. JA 370a-72a, 393a, 408a-12a.

To the extent that a municipality would, like Oneida-Herkimer, elect to send its waste to its own public landfill, the effect on all private disposal facilities, whether in-state or out-of-state, would be exactly the same. Local disposal, as opposed to export, would have the benefit of reducing the environmental impacts of shipping, particularly the impacts borne by other communities that suffer from air pollution, traffic and other burdens.[19] Moreover, any reduction in the volume of waste entering the market due to construction of a new public landfill would tend to reduce prices in both the intrastate and interstate disposal markets. JA 372a.

To the extent that municipalities would use flow control to establish integrated systems, as Oneida-Herkimer has, using combinations of technologies to reduce the volume of waste, the result would be an incontrovertible good, advancing the declared goals of Congress in RCRA. In this regard, flow control would make it possible for communities

19. *See* Br. of *amicus curiae* Environmental Defense.

to select new and innovative technologies that provide greater environmental benefits than technologies currently in use, particularly where the community is prepared to shoulder a higher short-term cost to gain long-term health and safety benefits.[20]

For communities such as Sussex or Charles City Counties in Virginia, nothing in these laws resembles the waste import bans examined by this Court in *City of Philadelphia v. New Jersey* and *Fort Gratiot v. Michigan*. Those cases struck down laws barring private landfills in New Jersey and Michigan from accepting out-of-state waste. The Oneida-Herkimer laws have no effect whatsoever on the ability of private landfills to accept waste. As discussed above, the Authority does not compete with private landfills at all because it serves the citizens of the Counties, to whom it owes a governmental responsibility. Moreover, as discussed above, the difficulties inherent in siting new landfills makes it more likely that communities adopting flow control will build transfer stations as the Authority did in 1991. Communities without space or means to build will still rely on export to secure disposal capacity. If the landfills in Sussex and Charles City see any decline in waste volume in the future, that may come from the nation's success in its policy to reduce waste and increase recycling. But such a change in the general commerce in waste would not affect landfills in Sussex or Charles City to any greater degree than landfills in New York.

Finally, neither the courts, the waste industry, nor local governments have developed any settled expectations based on *Carbone*. To the contrary, as Petitioners pointed out, Pet. 25-28, courts have adopted conflicting interpretations of the meaning of *Carbone*, and municipalities have

---

20. *See* Br. of *amicus curiae* Arkansas Association of Regional Solid Waste Management Districts, et al.

developed ad hoc arrangements to secure the benefits of flow control found to be constitutional by different courts.[21]

The public/private distinction articulated by the Second Circuit has the virtue of simplicity: municipalities that assume responsibility for the waste disposal needs of their citizens must do so fairly, favoring no private interest above any another.

The purposes underlying the Court's dormant Commerce Clause jurisprudence, as articulated by Justice Jackson in *HP Hood & Sons v. DuMond*, 336 U.S. 525 (1949), continue to reflect a balance between safeguarding the movement of interstate commerce and affording the states the power to effectively address threats to public health and the environment.

> Our system, fostered by the commerce clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them.

Id. at 539.

At the same time, Justice Jackson also recognized the equally important power of the state "to protect its inhabitants against perils to health or safety, fraudulent traders and highway hazards, even by use of measures which bear

---

21. *See USA Recycling v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995) for flow control valid under contracts; *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3d Cir. 1995) and *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999) for flow control valid where procurement is open to out-of-state bidders; *Ben Oehrleins & Son v. Hennepin County*, 113 F.3d 1372 (8th Cir. 1997) for flow control valid when applied to in-state disposal.

adversely on interstate commerce." *Id.* at 532. He saw the distinction between the government's lack of power to retard interstate commerce and its responsibility to protect the public as "deeply rooted in both our history and our law." *Id.* at 532.

Here, the Counties are exercising the power to provide traditional sanitation service to the community. Waste disposal service, like water, sewer, fire and police protection, lies at the foundation of civilized society,[22] and is invaluable to the commercial life of the nation. The Petitioners ask the Court to erase the distinction between public and private service in waste disposal which has been recognized for over 100 years. *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Gardner v. Michigan*, 199 U.S. 325 (1905). To do so would eliminate the "deeply rooted distinction" recognized by the Court in *HP Hood* and in every subsequent Commerce Clause case.

---

22. *See*, generally, Br. of *amicus curiae* Madison County, New York.

CONCLUSION

The flow control laws are an exercise of the police power for the protection of the general health and safety of the people of Oneida and Herkimer Counties. They aid in the provision of essential government service and are applied evenhandedly to all private entities, regardless of their location. There is no violation of the Commerce Clause and the decision below should be affirmed.

Respectfully submitted,

MICHAEL J. CAHILL
Counsel of Record
GERMANO & CAHILL, PC
4250 Veterans Memorial Highway
Suite 275
Holbrook, New York 11741
(631) 588-8778

JUDY DRABICKI
25723 NYS Rte 180
Dexter, NY 13634-4009

PETER M. RAYHILL
KERNAN & KERNAN P.C.
258 Genesee Street
Utica, NY 13502

BRUCE S. ROGOW
BRUCE S. ROGOW, P.A.
Broward Financial Centre
500 East Broward Blvd., Ste. 1930
Fort Lauderdale, Florida 33394

Attorneys for Oneida-Herkimer
Solid Waste Management Authority

RICHARD A. FRYE
FRYE FOLEY & CARBONE
2219 Genesee Street
Utica, NY 13501

Attorneys for Oneida County NY

THOMAS E. KELLY
HORRIGAN, HORRIGAN, LOMBARDO
& KELLY PC
49 East Main Street
Amsterdam, NY 12010

Attorneys for Herkimer County, NY

435

(19)

No. 05-1345

FILED

DEC 26 2006

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., AND INGERSOLL PICKUP INC.

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, AND COUNTY OF HERKIMER

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

EVAN M. TAGER
Counsel of Record
MIRIAM R. NEMETZ
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE ASSERTED DIFFERENCES BETWEEN RESPONDENTS' FLOW-CONTROL SCHEME AND CLARKSTOWN'S CONCEDEDLY DISCRIMINATORY ARRANGEMENTS ARE INSUBSTANTIAL 2

A. The Flow-Control Ordinances Possess The Discriminatory Features Of Clarkstown's Ordinance 2

B. The Public Purposes Of The Counties' Flow-Control Provisions Do Not Distinguish Them From Clarkstown's Ordinance 4

C. The Other Proffered Theories For Distinguishing *Carbone* Are Unpersuasive 14

II. THE COUNTIES' COMPLETE BAN ON THE EXPORT OF UNPROCESSED WASTE FAILS THE *PIKE* TEST 16

A. Respondents Fail To Refute Our Demonstration That The Flow-Control Provisions Severely Burden Interstate Commerce 17

B. The Putative Justifications For The Counties' Flow-Control Provisions Do Not Justify The Burden On Interstate Commerce 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases:

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) 11

Bigelow v. Virginia, 421 U.S. 809 (1975) 10

C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) ..... *passim*

California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905) 16

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 4, 7

Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) 11, 16

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) 13

Gardner v. Michigan, 199 U.S. 325 (1905) 16

Granholm v. Heald, 544 U.S. 460 (2005) 10

Minnesota v. Barber, 136 U.S. 313 (1890) 11

South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984) 14

SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2d Cir. 1995) 18

Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Mgmt. Corp., 770 F. Supp. 775 (D.R.I. 1991), aff'd, 947 F.3d 1004 (1st Cir. 1991) (per curiam) 10

Respondents concede that *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), was "firmly grounded" in "established precedent" and "did not establish a new constitutional rule." Br. 11. Having embraced *Carbone*, they cannot salvage their flow-control ordinances without showing that the public-private distinction adopted by the Second Circuit is one that makes a constitutional difference. Yet they make only the most tepid of efforts to show that the logic and language of *Carbone* do not apply every bit as much to publicly owned facilities as to facilities that are owned by a private company but are soon to be converted to public ownership. *See* Br. 17 n.7. Moreover, respondents do not even acknowledge, much less respond to, our showing that the Second Circuit's holding rests on an invalidly narrow interpretation of this Court's local processing cases. Finally, respondents do not deny that adoption of the public-private distinction would make flow control a fact of life across the country and render *Carbone* a dead letter because many local governments either already own waste management facilities or can easily obtain record title to such facilities.

Indeed, the sheer number of *amicus* briefs lauding flow control confirms that, if given the legal authority to impose flow control, localities throughout the country will not hesitate to do so. Yet beyond asserting that some courts have found creative ways to uphold flow control (thus forcing some participants in the waste industry to live with it), respondents make no response to our argument that the *de facto* overruling of *Carbone* that would result from affirmance of the judgment below would upset settled expectations and should instead be left to Congress, which has full constitutional authority to authorize flow control should it conclude that the free flow of interstate commerce in waste is not in the public interest.

Rather than join issue with the arguments made in our opening brief, respondents (and their *amici*) attempt to shift the focus to the virtues of an "integrated" public waste man-

agement program and the supposed unreliability of the private market to achieve waste reduction and recycling objectives. As we discuss more fully below, all of their arguments suffer from one or both of two flaws: (1) they could have been (and in most cases were) made in support of the ordinance struck down in *Carbone*; and (2) they may be relevant to whether a particular flow-control ordinance should survive the strict level of scrutiny applicable to discriminatory enactments, but are irrelevant to the question here, which is whether the Counties' flow-control laws are discriminatory in the first place.

I. THE ASSERTED DIFFERENCES BETWEEN RESPONDENTS' FLOW-CONTROL SCHEME AND CLARKSTOWN'S CONCEDEDLY DISCRIMINATORY ARRANGEMENTS ARE INSUBSTANTIAL

In our opening brief (at 13-19), we showed that *Carbone*'s analysis of Clarkstown's flow-control provision fits the Counties' similar ordinances like a glove. We also demonstrated (at 26-33) that the Counties' flow-control scheme squarely implicates the concerns animating the "local processing" cases and other decisions that *Carbone* followed. Respondents make virtually no effort to refute our analysis of the meaning of *Carbone*. Instead, they contend that differences between the Counties' flow-control ordinances and Clarkstown's provision justify opposite treatment under the Commerce Clause.

A. The Flow-Control Ordinances Possess The Discriminatory Features Of Clarkstown's Ordinance

Respondents' contention that their flow-control provisions lack the discriminatory features that were fatal to Clarkstown's ordinance is misguided. Respondents first point out (Br. 16) that Clarkstown's ordinance covered out-of-state waste that had been brought into the town for processing, while their ordinances apply only to locally generated waste. Thus, they argue, "there is no burden shifted to the

residents or waste generators" of other States. *Ibid.*

This relatively minor difference from Clarkstown's ordinance does not justify departure from *Carbone*. The *Carbone* opinion does not treat the ordinance's impact on out-of-state waste as the principal (or even a particularly important) flaw in Clarkstown's flow-control scheme. Instead, the Court concluded that the flow-control law was unconstitutional because of its undoubted effect on ***local*** waste: It required the local processing of *Clarkstown*'s waste and therefore created a discriminatory barrier to interstate trade. See 511 U.S. at 386. Respondents do not deny that their flow-control regime imposes a functionally identical requirement for the local processing of local waste: As in *Carbone*, it entirely "bars the import of the processing service" (*id.* at 392) and thus is "just one more instance of local processing requirements that [the Court] long [has] held invalid" (*id.* at 391).

Second, respondents observe (Br. 16) that Clarkstown's ordinance was discriminatory because it designated a "single local proprietor" to receive waste, thus "favor[ing] that particular proprietor and disfavor[ing] all others, including competing facilities located out-of-state." Their argument that this distinguishes Clarkstown's ordinance from their own (*ibid.*) is predicated entirely on their assumption that the Authority is not a "local proprietor" within the meaning of *Carbone*. But there is no practical difference between the Counties' facilities and the facility involved in *Carbone*. The Clarkstown Transfer Station was built by a private company under a contract with the Town, which had decided to build the state-of-the art facility in order to provide waste disposal services for the community following the closure of its public landfill. See *Carbone* JA24-27. Thereafter, a private company operated the facility under a contract with the Town. See *id.* at 27. Similarly here, the designated transfer stations were constructed by and are operated by a private company under contracts with the Authority. See JA69a-95a, 176a-190a.

The fact that the Counties' facilities are operated via a public-private partnership that is indistinguishable from the one in *Carbone* – save for the functionally insignificant fact that Clarkstown's contractor temporarily held title to the Town's facility – compels the conclusion that the flow-control provisions that favor them are equivalent under the Commerce Clause. See Brief of the National Solid Waste Mgmt. Ass'n, *et al.* ("NSWMA Br."), at 18-19. Even if respondents' transfer facilities were operated entirely by public employees, however, the flow-control provisions would be discriminatory under *Carbone*. As we explained in our opening brief (at 13-17), the necessary implication of *Carbone* is that the regulatory foreclosure of the interstate market in favor of an in-state provider constitutes discrimination, regardless of whether the facility is owned by a private company or a local government. Respondents offer no good reason to conclude otherwise.[1]

B. The Public Purposes Of The Counties' Flow-Control Provisions Do Not Distinguish Them From Clarkstown's Ordinance

Having failed to identify any meaningful differences in either the flow-control provisions themselves or the facilities

---

[1] Relatedly, respondents rely on *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), in which the Court stated that a law designed to "slow the flow of *all* waste into the State's remaining landfills" would not be discriminatory. Br. 14 (quoting 437 U.S. at 627). But the flow-control ordinances are ***not*** a "fair, across-the-board regulation of commerce" that simply "reduc[e] the amount of trade" in waste services, as respondents contend (Br. 32). Instead, the provisions ***direct*** commerce to the Authority's in-state facilities – allowing ***intrastate*** commerce to continue while eliminating only ***interstate*** commerce. Thus, the flow-control provisions are nothing like a general limitation on the sale of lead-containing paint or on cigarette advertising, as respondents contend (*ibid.*). Instead, they are equivalent to a regulation permitting consumers to purchase only paint or cigarettes that were manufactured by the government in local plants. Such a ban on interstate transactions clearly would violate the Commerce Clause.

that benefit from them, respondents next contend (Br. 17) that "[a]n examination of the different purposes of the Clarkstown and Oneida-Herkimer laws reveals the constitutional distinction." They elaborate that "Clarktown's arrangement with its operator was not public management," whereas "[t]he Oneida-Herkimer system is publicly managed." *Ibid.* Several of the *amici* echo this argument, contending that flow control is "presumptively valid" when it is part of an "integrated waste management plan." Brief of the State of New York, *et al.* ("NY Br."), at 8; see also, *e.g.*, Brief of the Arkansas Ass'n of Regional Solid Waste Mgmt. Dists., *et al.* ("Ark. Br."), at 15; Brief for the Fed'n of New York Solid Waste Ass'ns at 22-23; Brief of Envtl. Defense ("ED Br."), at 7-9. As we discuss below, however, neither they nor respondents can point to any meaningful differences between Clarkstown's supposedly "hasty arrangement * * * with its private transfer station operator" (Resp. Br. 19) and respondents' own waste management system. Nor do they explain how variations in the extent and quality of public management between the two systems can supply the basis for a sensible constitutional rule that requires a finding of discrimination in *Carbone*, but no similar finding here.

First of all, respondents' pejorative references to Clarkstown's waste management arrangements are entirely unwarranted. Although the Town had to act relatively quickly to replace the landfill it was closing, it engaged in careful planning for the construction and operation of its transfer station: It conducted an environmental assessment to ensure that the new facility would have no detrimental environmental impact (*Carbone* JA25); engaged in a competitive bidding process in order to select the company that would build and then operate the transfer station (*id.* at 26-27); held a public hearing regarding the selection of one of the eleven competing contractors (*id.* at 27); performed remediation at the transfer station site (*id.* at 27-28); and entered into an agreement with a neighboring town to manage its waste through the new facil-

ity (*id.* at 28-29). Thus, the flow-control measure was not an effort by the Town to foist its waste management obligations onto the private sector, but was "just one element of the Town's integrated transition of its solid waste management facility from landfill to transfer station." *Id.* at 30; see also Brief for the State of New York, *et al.*, in *Carbone* ("*Carbone* NY Br.") at 15 ("[T]he Town agreed to construct a state-of-the art transfer station that ultimately would form part of a county-wide solid waste management program.").

Respondents nevertheless argue that "the Counties and the Authority are taking possession of the region's waste in order to reduce the exposure of their *residents and businesses* to environmental liability, while Clarkstown less responsibly "commanded its citizens to deal with a private entity for waste service." Br. 21-22 (emphasis in original). According to respondents, their system insulates local generators from future liability for environmental cleanups, whereas Clarkstown's residents were left vulnerable to CERCLA liability as "arrangers" because "their transactions with the operator sent the waste on its way." *Ibid.* New York's brief makes much of this distinction, arguing that "a government's decision to take title to waste generated by its citizens" "implicates core sovereignty interests." NY Br. 9; see also Brief of the Economic Development Growth Enterprises Corp., *et al.* ("EDGE Br."), at 13 (arguing that flow control permits "collective responsibility for potential future environmental liability").

In fact, the Counties' generators are situated ***identically*** to Clarkstown's generators in this respect. In most areas in the Counties, the Authority does ***not*** provide "cradle-to-grave" services by picking up waste at curbside. JA97a, 209a. Instead, the prevailing waste management arrangements are ***exactly the same*** as in *Carbone*: Generators enter into contracts with private haulers; the haulers bring the waste to a facility designated by law; and the private contractor operating the facility then sends the waste to a disposal

site approved by the local government. If Clarkstown's generators were at risk of CERCLA liability for arranging to dispose of their waste in compliance with the Town's flow-control regulation, then the same surely can be said of generators within the Counties. Moreover, respondents do not explain why their arrangements should be understood to vest lawful "possession" of the waste with the government when Clarkstown's virtually identical arrangements did not.

Furthermore, there is no factual basis for respondents' suggestion (Br. 22) that Clarkstown "sat on the sidelines" and "relied on the private operator to manage waste" while exposing residents to the risk that the transfer station operator would "deliver Clarkstown waste to an environmentally-unsafe facility." To the contrary, in *Carbone*, as here, the Town defended its flow-control provisions as resting on "the traditional role of local governments in having responsibility *and* control for garbage removal versus the interest of the private waste service sector in substituting 'free trade' as a preferred system." *Carbone* Resp. Br. 15. Thus, Clarkstown required its contractor to "transport[] * * * the solid waste delivered to the transfer station to an approved landfill for final disposal." *Carbone* JA26; see also *id.* at 27 (Clarkstown's agreement with the landfill operator provided for "transportation to and disposal at permitted landfills outside of New York"). The Authority has a very similar arrangement with its own contractor, which has entered into an agreement with the Authority to deliver waste to a specified in-state landfill or other landfills receiving the approval of the Authority. JA177a.

In any event, the desire to protect local generators from unsafe disposal of their waste is irrelevant to the validity of the public-private distinction. The fact that the flow-control provisions serve a legitimate governmental interest is pertinent to whether they can ***withstand*** strict scrutiny, but does not drive the analysis of whether they must be examined under strict scrutiny in the first place. As this Court has made

clear, even legitimate governmental ends may not be achieved through discriminatory means when those interests can be served by non-discriminatory measures. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626 ("the evil of protectionism can reside in legislative means as well as legislative ends"). By failing to argue that the flow-control measures can be justified under strict scrutiny, respondents implicitly concede that the Counties can employ other means to satisfy its objectives.

Indeed, as EDGE acknowledges (at 13), the Authority protects citizens by "ensuring that the waste [is] only sent for disposal to facilities with the best environmental protective systems and proven management experience." See also JA303a (letter from Authority Director Hans Arnold assuring residents that the flow-control system protects them from liability by sending waste to the modern Empire Landfill in Pennsylvania). The Counties can do the same thing without flow control, as many local governments now do, by requiring local haulers to certify that they will bring all waste to RCRA-compliant facilities or requiring them to obtain preapproval of any facility to which they desire to transport waste. See *Carbone*, 511 U.S. at 393; *id.* at 405 (O'Connor, J., concurring). Furthermore, generators who prefer to have the Authority control the ultimate disposition of their waste may employ haulers that patronize the Authority's facilities. Thus, as in *Carbone*, the argument that flow control is "necessary to ensure the safe handling and proper treatment of solid waste" (*id.* at 392-393) must be rejected.

Respondents next contend (Br. 22) that, "[u]nlike the fees charged by the Authority for its services, the citizens' fees in Clarkstown went to the operator." This alleged distinction also disappears upon examination. In Clarkstown as in the Counties, generators paid private haulers to pick up their waste and dispose of it; the haulers then brought the waste and paid tipping fees to the in-state facility designated by the government. Contrary to New York's contention (at 4) that

the "admitted purpose" of Clarkstown's flow control ordinance was "merely to bolster a local firm's revenue," these tipping fees were not used to enrich the Clarkstown Transfer Station's operator with monopoly profits. Instead, the fees were used to satisfy the financial obligations that the Town incurred when the transfer station was constructed at its behest. *Carbone*, 511 U.S. at 387 ("The town would finance its new facility with the income generated by the tipping fees.").

The tipping fees here serve the exact same purpose: They are used, in part, to pay off the public bonds that were issued to finance construction of the Counties' facilities. See JA213a. The Authority's director, Hans Arnold, admitted that flow control was devised as a means of "alleviat[ing] the County tax burden" and "keep[ing] the 'upfront' costs of the project off the real property taxes." JA307a-308a. Indeed, that financing objective was the principal purpose of the provision. See JA311a ("The ability to finance and then operate these facilities depends upon the legal commitment of the waste."). Thus, while respondents suggest that the Counties' ***upfront*** capital investment distinguishes their flow-control provision from Clarkstown's (Br. 23), that distinction is purely formalistic: ***Both*** the Counties and Clarkstown used flow control to fund the construction of their facilities without using tax dollars. See JA391a (observation of respondents' expert that "[p]olitical * * * considerations may make it desirable for the Authority to be a financially self-sufficient system with a direct funding source, as opposed to relying on annual appropriations from general tax revenues").

Relatedly, several of the *amici* argue that it is important to the discrimination analysis that the Counties' tipping fee, which they call a "system charge," does not merely cover the disposal costs but is used to support other aspects of the Counties' waste management system. See, *e.g.*, Ark. Br. 15. Respondents make a similar point in their discussion of the *Pike* test, arguing (Br. 37-38) that the flow-control provisions should be upheld because they allow the Authority to charge

fees that are high enough to subsidize their recycling and other programs.

The fact that the Counties are using flow control to generate revenues for their programs does not mean that these measures are not discriminatory. To the contrary, the Counties' insistence that generators and haulers spend all their waste disposal dollars within the Counties so that the funds can be used to benefit the local community reflects classic protectionism. See JA305a ("Long-term reliance on waste exportation would mean that most of the dollars collected in tipping fees (approximately $10 million per year) will leave the local economy, thus losing the economic benefits that would be associated with a new local landfill."); see also *Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Mgmt. Corp.*, 770 F. Supp. 775, 781 (D.R.I. 1991) (finding flow-control regulation requiring delivery of commercial waste to public landfill to be "essentially protectionist" because the "profit" from the tipping fees was "used to finance such other programs as hazardous waste disposal, recycling, and construction of a waste-to-energy facility that [the local solid waste management authority] [was] charged with the responsibility of implementing"), aff'd, 947 F.2d 1004 (1st Cir. 1991) (per curiam).

Indeed, if respondents can justify the flow-control provisions on the ground that they use the "system fee" to support non-revenue-generating waste management activities, then there is no reason why they could not also justify monopolizing waste services to generate revenues for the public schools. As this Court stated in *Carbone*, however, "revenue generation is not a local interest that can justify discrimination against interstate commerce." See 511 U.S. at 393.

Were the rule any different, local governments would be able to monopolize all kinds of services that otherwise could be provided in the interstate market. For example, a town might seek to justify setting itself up as the monopolistic seller of milk to local residents by arguing that it intends to

use surplus "milk system fees" to fund milk safety programs and dairy farming innovations which the private sector could not provide. But it is unimaginable that the government's interest in financing these programs would be found to justify the exclusion of out-of-state sellers from the local milk market.[2]

Respondents next argue (Br. 24) that the Authority should not be viewed as competing with out-of-state firms because it provides services only to persons to whom it has "a governmental responsibility" and does not try to export its services to citizens of other States. That makes no difference to the analysis, however: This Court repeatedly has found regulations to be discriminatory even when the advantage given to in-state sellers affects only local buyers. See *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Minnesota v. Barber*, 136 U.S. 313 (1890). It is undisputed that out-of-state firms were interested in providing disposal services to haulers handling local waste but were prevented from doing so by the flow-control laws. See JA253a-259a, 269a-274a, 292a-293a. The assertion that the Authority is not competing with out-of-state firms is therefore entirely semantic, and does not affect the Commerce Clause analysis.

Respondents also argue (Br. 26) that the Counties' flow-

[2] New York points out that some States operate public lotteries while prohibiting private ones and that others have monopolized the retail sale of some forms of alcohol. NY Br. 12. Of course, no State can prohibit its residents from traveling to another State to purchase a lottery ticket. *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975). Moreover, whatever interest a State has in preventing residents from acquiring lottery tickets by mail or over the internet would be relevant to whether a prohibition survives strict scrutiny, not whether the prohibition is discriminatory. The same would be true of a state law requiring all liquor to be bought from state-owned stores and thereby effectively banning the purchase of liquor in interstate commerce were it not for the Webb-Kenyon Act, which expressly authorizes this kind of law. See *Granholm v. Heald*, 544 U.S. 460, 478-482 (2005).

control regime can be distinguished from Clarkstown's because it serves the "unique governmental purpose" of achieving "maximum levels of waste reduction and recycling." Precisely the same argument was made in *Carbone*. See *Carbone* Resp. Br. 31-32 ("Clarkstown's comprehensive control over the waste flow discarded within the Town limits enables it successfully to monitor and ensure compliance with its mandatory solid waste plan," which included mandatory recycling); see also *Carbone* NY Br. 24 ("[B]y increasing recycling and imposing volume-based disposal costs, the Ordinance promotes the reduction of the overall volume of solid waste to the fullest extent possible.").

Here, as in *Carbone*, the flow-control provisions' usefulness in promoting recycling cannot save them from invalidation, because the Counties indisputably can advance their waste reduction goals through non-discriminatory methods. See, *e.g.*, JA205a-206a, 216a, 226a-227a, 345a-347a. Contrary to respondents' contention that there is "no possibility that the federal, state, or local waste reduction and recycling objectives could be met" without flow control (Br. 38), such other measures have been shown to be equally if not more effective. See JA205a (citing an EPA study concluding that "there are no data showing that flow controls are essential * * * for the long term achievement of State and local goals for source reduction, reuse and recycling"); JA345a (citing another EPA study); JA468a (admission of Authority member that Utica was successful in encouraging waste reduction and recycling by employing a bag fee).

Furthermore, there is no basis whatsoever for respondents' contention (Br. 17) that the elimination of private competition is necessary because the goals of waste reduction and recycling are "antithetical to private sector waste interests." Many private companies are eager to provide recycling services and therefore are very supportive of governmental efforts to promote recycling. In fact, at least one private firm was actively engaged in recycling local residential

waste until the Counties' flow-control provisions barred it from contracting with private haulers for the purchase of curbside recyclables. JA97a.[3]

Respondents next argue (Br. 33) that petitioners are seeking to "use the Commerce Clause to shore up the old structure of the waste markets, in order to protect the position of low-cost landfills in these market." In fact, the "old structure of the waste market" that petitioners seek to protect is simply the interstate market, which this Court has repeatedly found to be entitled to protection under the Commerce Clause.

Thus, this case is not analogous to *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), as respondents contend (at 34). Although the state legislation at issue there changed the "particular structure" of the retail gasoline industry, it did not "prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market." *Exxon*, 437 U.S. at 126. The flow-control provisions possess all of these flaws: They entirely prohibit the interstate movement of unprocessed waste, impose added costs upon interstate goods by requiring them to pass through an in-state facility before they can travel to an out-of-state disposal destination, and monopolize demand for the benefit of an in-state (albeit public) facility while withholding it from out-of-state firms.

Moreover, preserving interstate trade in waste will not block "innovative approaches to waste management," as re-

---

[3] In any event, a locality has no legitimate interest (and certainly not a weighty one) in requiring generators to reduce the amount of waste they generate and to separate recyclables if those generators do not intend to send their waste to the locality's facilities. If an out-of-state waste-to-energy facility wants to maximize the amount of waste it receives in order to meet its contractual obligations to deliver energy to its customers (as respondents once did (see JA486a)), the generator's home county has no valid basis for thwarting that by imposing flow control for the logically incoherent purpose of reducing the amount of waste that ***it*** needs to dispose of.

spondents assert (at 34). The large, privately operated landfills that serve the interstate market are among the most technologically advanced and environmentally sound in the country. See NSWMA Br. 12-13; Brief of Sussex County, *et al.* ("Sussex Br."), at 13-14. Moreover, these landfills are heavily regulated by the EPA, state environmental agencies, and their host jurisdictions. See JA367a (statement of respondents' expert that the Authority chose the Empire Landfill in Pennsylvania to handle waste from its transfer stations because "Pennsylvania's environmental regulations * * * were more stringent than those in New York State"); JA344a ("Landfills now operate under strict regulations and do not present substantial, if any, externalities.").

C. The Other Proffered Theories For Distinguishing *Carbone* Are Unpersuasive

The *amicus* briefs offer several other arguments that the flow-control provisions here do not discriminate against interstate commerce. None of them provides a logical basis for distinguishing the Counties' flow-control provisions from the one in *Carbone*.

1. The brief of the National Association of Counties, *et al.* ("NAC Br.") argues that the market-participant doctrine affirmatively supports the Counties' imposition of flow control. NAC contends that the Court's market-participant decisions implicitly accept that local governments can use their power to impose taxes to support their market-based activities. See NAC Br. 10-15. NAC reasons that, if a local government can tax its citizens and displace the private market by directly providing waste collection and disposal as a public service, it follows that flow control must also be permissible. See *id.* at 15

NAC's syllogism is faulty. Just as "[i]t is no defense in an action charging vertical trade restriction that the same end could be achieved through vertical integration," so too there is no validity to "the contention that a State's action as a

market regulator may be upheld against Commerce Clause challenge on the ground that the State could achieve the same end as a market participant." *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 98-99 (1984). Here, respondents concede (at 24) that the flow-control ordinances directly regulate commerce and do not fall within the market-participant exception. Respondents accordingly cannot avoid the application of strict scrutiny on the ground that they could have achieved similar results without flow control.

2. The Rockland County Solid Waste Management Authority contends that the so-called "state-action exemption" authorizes the flow-control provisions. As Rockland explains (at 5), the state-action exemption, under certain circumstances, provides local governments with immunity "from federal anti-trust prosecutions pursuant to the Sherman Act." Although the doctrine derives from the Court's interpretation of the antitrust laws and has never been applied to Commerce Clause challenges, Rockland contends (at 9-10) that there is an "incongruity" between the exemption of governmental monopolies from the antitrust laws and "the restraints imposed on state power by the Court's effort to curtail economic protectionism under the dormant Commerce Clause."

Neither this Court's decisions nor those of lower courts provide any support for the argument that the Commerce Clause and the Sherman Act should restrict governmental activities co-extensively. To the contrary, many of the state and local measures that this Court has invalidated under the Commerce Clause – including the flow-control provision in *Carbone* (see 511 U.S. at 424 n.13 (Souter, J., dissenting)) – would be covered by the state-action exemption to the antitrust laws. This argument thus has no force.

3. Several of the *amici* argue that the flow-control measures are non-discriminatory because they fall within the Counties' traditional police powers. See, *e.g.*, NY Br. 7; Ark. Br. 9-14. Respondents echo this argument in their dis-

cussion of the *Pike* test. See Br. 43 (arguing that the Counties are merely "exercising the power to provide traditional sanitation service to the community"). Of course, the same argument could have been made – and indeed was made – in *Carbone*. See *Carbone* NY Br. 23 ("Police power ordinances, such as Clarkstown's, have a strong presumption of validity."). As this Court has repeatedly ruled, however, even health and safety regulations which implicate core government functions are not exempt from strict scrutiny. See, *e.g.*, *Dean Milk Co.*, 340 U.S. at 354 (State may not adopt discriminatory regulations "even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable non-discriminatory alternatives are available"). Respondents offer no legitimate reason to abandon that well-established principle here.[4]

II. THE COUNTIES' COMPLETE BAN ON THE EXPORT OF UNPROCESSED WASTE FAILS THE *PIKE* TEST

If, despite our arguments, the Court concludes that the ownership of the preferred facilities makes the Counties' flow-control provisions non-discriminatory, it should strike down the provisions under the *Pike* test. Given the increasingly interstate character of the market for waste processing and disposal services (JA240a; see also Sussex Br. 7), a regulation that categorically excludes two counties' waste (amounting to about 200,000 tons per year (JA197a)) from the interstate market must be viewed as imposing a very substantial burden on interstate commerce. Respondents fail to refute our argument that this burden is excessive in comparison to the local benefits that the flow-control provisions os-

[4] Several of the *amicus* briefs cite *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905), and *Gardner v. Michigan*, 199 U.S. 325 (1905), in support of their contention that the flow-control ordinances are presumptively valid. But no one disputes the observation in our opening brief (at 48 n.16) that the Commerce Clause was neither raised nor addressed in those cases.

tensibly provide.

A. Respondents Fail To Refute Our Demonstration That The Flow-Control Provisions Severely Burden Interstate Commerce

In our opening brief (at 8-10), we showed that the lower courts systematically discounted or ignored the substantial burdens on interstate commerce imposed by the flow-control provisions because the restrictions affect both in-state and out-of-state companies. Respondents do not dispute our characterization of the decisions below.[5] To the contrary, they continue to contend (Br. 30) that the flow-control provisions satisfy *Pike* because "there is [no] greater burden placed upon an out-of-state entity by the laws than on a similarly situated in-state entity."

That assertion, of course, is also the mainstay of respondents' argument that the ordinances are non-discriminatory. But even if the Court accepts respondents' view that the public ownership of the preferred facilities makes the Counties' flow-control provisions ***non-discriminatory***, that same fact should not also mean that the regulations do not ***burden*** interstate commerce. Indeed, respondents do not deny that their provisions impose ***exactly the same*** burden that was present in *Carbone*: a foreclosure of the local market for waste processing services which, if adopted generally, would ensure that no one ***ever*** crossed state lines to obtain that service.

Respondents next contend (Br. 30-31) that the construction of their transfer station actually increased the amount of waste entering interstate commerce because the Authority has at times sent residual waste out of state for disposal. The

---

[5] Thus, the *Pike* issue does not present a mere "factual dispute" about the magnitude of the burden on interstate commerce, as the Onondaga County Resource Recovery Agency, *et al.* contend (at 24). Neither the Second Circuit nor the district court actually conducted the careful balancing of benefits and burdens that the *Pike* test requires. See Pet. App. 70a, 18a.

same argument could have been made in *Carbone* – Clarkstown's transfer station also sent waste to out-of-state landfills (*Carbone* Resp. Br. 36) – yet Justice O'Connor had little difficulty concluding that the flow-control provision excessively burdened interstate commerce. See 511 U.S. at 406 (O'Connor, J., concurring). In any event, respondents admit (Br. 26) that they will soon begin sending the entire nonrecyclable portion of the local waste stream to their captive in-state landfill. At that point, the County's waste disposal market will be hermetically sealed, with no out-of-state waste coming in, and no local waste entering the interstate market.[6]

Respondents argue (Br. 35) that the flow-control provisions necessarily impose an acceptable burden on interstate commerce because the Authority could lawfully institute public collection, thus displacing private haulers entirely. To be sure, a cradle-to-grave regime that displaced private competition without imposing any regulatory restrictions would be exempt from Commerce Clause scrutiny as ***market participation***.[7] But the fact that such a system would not implicate the Commerce Clause does not mean that the state's restriction of interstate competition through the exercise of its ***regulatory*** powers automatically satisfies the *Pike* test.

---

[6] Respondents contend (Br. 23) that private companies are not barred from constructing facilities for handling out-of-state waste within the Counties. But no firm is likely to invest in such a facility when it will be unable to compete for local waste. JA206a, 214a.

[7] Respondents explain (Br. 35 n.17) that "[w]here public collection is instituted, municipalities may contract with private haulers to perform the service, and direct them to specific disposal facilities pursuant to the contracts." That is a straightforward application of the market-participant doctrine. See *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 514-518 (2d Cir. 1995). The Commerce Clause does not afford the government similar leeway when it acts as a market regulator.

B. The Putative Justifications For The Counties' Flow-Control Provisions Do Not Justify The Burden On Interstate Commerce

Respondents cannot establish that the burdens imposed by the flow-control provisions are counterbalanced by the resulting local benefits. Many of the putative benefits of flow control are attributable to other features of the waste management system, which would provide the same benefits without flow control. All of them can be achieved by methods that are far less restrictive of interstate commerce.

For example, respondents argue that their system allows "the application of different technologies to different components of the waste stream." Br. 37. But respondents assuredly can "defin[e] the categories of waste that can be recycled, composted, or consigned to land disposal" (*ibid.*) without imposing flow control.

Respondents also contend (Br. 38) that the flow-control provisions permit them to encourage recycling by accepting recyclables free of charge. Many of the *amici* also identify the creation of incentives to recycle as the principal benefit of the ordinances. See, *e.g.*, ED Br. 11. As we discuss above, however, EPA has concluded that local governments can achieve recycling goals without subjecting their entire waste streams to an export embargo. JA205a, 345a.

Respondents next argue (Br. 38) that, "if haulers were allowed to take waste out of the Counties, the Authority would not be able to insist upon higher environmental standards at private landfills elsewhere." As noted above, however, the Authority may employ much less burdensome measures to ensure that waste is delivered only to environmentally safe facilities. There is no reason to doubt that this alternative would protect residents from environmental liability just as effectively as closing the State's borders to the export of unprocessed waste.

Addressing the burden that would result if other jurisdic-

tions were to adopt similar measures, respondents contend (at 39-40) that the widespread adoption of flow control would ***increase*** interstate commerce in waste. In light of this Court's rulings in *Carbone* and the other local processing cases, it must greet with skepticism any claim that interstate commerce is ***facilitated*** by requiring all waste to pass through a local governmental facility before leaving the state of origin. In any event, given the Counties' admission that they soon will withdraw from the interstate market entirely, it is inevitable that the burgeoning interstate market in waste management services will be dramatically reduced if communities across the country follow in the Counties' footsteps.

Further, there is no reason to credit respondents' prediction (Br. 40) that other jurisdictions will use flow control to send waste ***into*** interstate commerce, rather than to keep it ***out of*** interstate commerce as the Counties plan to do. Even though some jurisdictions may lack the space to construct new local landfills, as respondents assert (*ibid.*), flow control has more typically been used to finance expensive waste-to-energy facilities and incinerators (see JA317a-318a), which require much less space than landfills.

Respondents are equally off base in defending flow control on the ground that it allows communities "to select new and innovative technologies that provide greater benefits than the technologies currently in use." Br. 40-41. As noted above, while there is no reason to believe that local isolation fosters technological advance (JA201a), there is ample evidence that large landfills serving the interstate market enjoy economies of scale that permit them to employ the most advanced and environmentally protective waste management techniques. See JA202a-203a; Sussex County Br. 11, 13-14; NSWMA Br. 12-13. Flow-control provisions that cut off the interstate flow of waste will impede these advances.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

EVAN M. TAGER
Counsel of Record
MIRIAM R. NEMETZ
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

DECEMBER 2006

No. 05-1345

In the

SUPREME COURT OF THE UNITED STATES

UNITED HAULERS ASSOCIATION, INC., *et al.*,
Petitioners,
v.
ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, *et al.*
Respondents.

BRIEF *AMICI CURIAE* of the ARKANSAS ASSOCIATION of REGIONAL SOLID WASTE MANAGEMENT DISTRICTS, BRISTOL RESOURCE RECOVERY FACILITY OPERATING COMMITTEE, CAPE MAY COUNTY MUNICIPAL UTILITIES AUTHORITY, CITY OF TAMPA, CONNECTICUT CONFERENCE of MUNICIPALITIES, CONNECTICUT RESOURCES RECOVERY AUTHORITY, DELAWARE COUNTY SOLID WASTE AUTHORITY, ECOMAINE, GREATER LEBANON REFUSE AUTHORITY, MARION COUNTY, OREGON, METRO REGIONAL GOVERNMENT, MINNESOTA RESOURCE RECOVERY ASSOCIATION, MONTGOMERY COUNTY, OHIO, NEW YORK STATE ASSOCIATION of COUNTIES, NORTHWEST ARKANSAS REGIONAL SOLID WASTE MANAGEMENT DISTRICT, OUTAGAMIE COUNTY, WISCONSIN, PINE BELT REGIONAL SOLID WASTE MANAGEMENT AUTHORITY, SNOHOMISH COUNTY, WASHINGTON, SOLID WASTE AUTHORITY of CENTRAL OHIO, SOLID WASTE DISPOSAL AUTHORITY of the CITY of HUNTSVILLE, SPOKANE REGIONAL SOLID WASTE SYSTEM, WASATCH INTEGRATED WASTE MANAGEMENT DISTRICT and the YORK COUNTY SOLID WASTE and REFUSE AUTHORITY

IN SUPPORT OF RESPONDENTS

Scott M. DuBoff*
Wright & Talisman, P.C.
1200 G Street, N.W., Suite 600
Washington, D.C. 20005-3802
(202) 393-1200
Counsel for Amici Curiae

*Counsel of Record
(Additional Counsel Listed on Inside Cover)

Robert Michalik
Michalik Bauer Silvia & Ciccarillo
35 Pearl Street, Suite 300
New Britain, CT 06051
Counsel for Bristol Resource Recovery Facility Operating Committee

Laurie Hunt, Managing Director of Legal Services
100 Constitution Plaza
Hartford, CT 06103
Counsel for Connecticut Resources Recovery Authority

Michael F.X. Gillin
230 North Monroe Street
Media, PA 19063
Counsel for Delaware County Solid Waste Authority

Nicholas Nadzo
Jensen Baird Gardner & Henry
Ten Free Street
P.O. Box 4510
Portland, ME 04112
Counsel for ***ecomaine***

Samuel G. Weiss, Jr.
802 Walnut Street
Lebanon, PA 17042
Counsel for Greater Lebanon Refuse Authority

Scott Norris
Assistant Legal Counsel
Marion County, Oregon
555 Court Street, NE
P.O. Box 14500
Salem, OR 97309
Counsel for Marion County Oregon

Marvin Fjordbeck
Sr. Assistant Legal Counsel
Metro Regional Government
600 Northeast Grand Ave.
Portland, OR 97232
Counsel for Metro Regional Government

Mathias H. Heck, Jr.
Montgomery County, Ohio
Prosecuting Attorney
451 West Third Street
P.O. Box 972
Dayton, OH 45422
Counsel for Montgomery County, Ohio

Stephen J. Acquario
General Counsel
New York State Association of Counties
111 Pine Street
Albany, NY 12207
Counsel for New York State Association of Counties

Michael Rainwater
Rainwater, Holt & Sexton
6315 Ranch Drive
Little Rock, AR 72223
Counsel for Northwest Arkansas Regional Solid Waste Management District

Joseph P. Guidote, Jr.
Office of Corporation Counsel
Outagamie County, Wisconsin
410 South Walnut Street
Appleton, WI 54911
Counsel for Outagamie County, Wisconsin

Moran M. Pope, III
Pope & Pope, P.A.
301 South 40th Avenue
Hattiesburg, MS 39402
Counsel for Pine Belt Regional Solid Waste Authority

Janice E. Ellis,
Prosecuting Attorney
George B. Marsh,
Deputy Prosecuting Attorney
Snohomish County, Washington
3000 Rockefeller Avenue
Everett, WA 98201
Counsel for Snohomish County, Washington

Robert G. Beaumier, Jr.
Assistant City Attorney
City of Spokane
808 West Spokane Falls Blvd.
Spokane, WA 99201
Counsel for Spokane Regional Solid Waste System

Harold J. Anderson
Chief Counsel, Solid Waste
Authority of Central Ohio
6220 Young Road
Grove City, OH 43123
Counsel for Solid Waste Authority of Central Ohio

Charles H. Younger
P.O. Box 2795
Huntsville, AL 35804
Counsel for Solid Waste Disposal Authority of the City of Huntsville, Alabama

Larry S. Jenkins
Wood Crapo LLC
500 Eagle Gate Tower
60 East South Temple Street
Salt Lake City, UT 84111
Counsel for Wasatch Integrated Waste Management District

Robert M. Strickler
Griffith, Strickler, Lerman & Solymus
110 South Northern Way
York, PA 17402
Counsel for York County Solid Waste and Refuse Authority

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

STATEMENT OF INTEREST OF *AMICI* 3

SUMMARY OF ARGUMENT 7

ARGUMENT 8

CONCLUSION 25

TABLE OF AUTHORITIES

CASES Page

C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) 3, 4, 23

California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905) 3, 9

Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) 12, 21, 23

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) 12, 13

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 9, 11

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999) 13

Gardner v. Michigan, 199 U.S. 325 (1905) 3, 9

General Motors Corp. v. Tracy, 519 U.S. 278 (1997) 14, 15, 18

Harvey & Harvey, Inc. v. County of Chester,
68 F.3d 788 (3d Cir. 1995).....3, 11, 24

Houlton Citizens' Coalition v. Town of Houlton,
175 F.3d 178 (1st Cir. 1999).....3, 11, 24

Brotherhood of Locomotive Fireman & Enginemen v. Chicago, Rock Island & Pacific Railroad Co.,
393 U.S. 129 (1968).....21

Maharg, Inc. v. Van Wert Solid Waste Management District,
249 F.3d 544 (6th Cir. 2001) 24

Minnesota v. Clover Leaf Creamery Co.,
449 U.S. 456 (1981) 21

National Solid Waste Management Ass'n v. Pine Belt Regional Solid Waste Management Authority,
389 F.3d 491 (5th Cir. 2004) 24

New Energy Co. v. Limbach,
486 U.S. 269 (1988).....11, 20

Oklahoma Tax Commission v. Jefferson Lines, Inc.,
514 U.S. 175 (1995).....11

Oregon Waste Systems, Inc. v. Department of Environmental Quality,
511 U.S. 93 (1994).....4, 20

Panhandle Eastern Pipe Line Co. v. Michigan, Public Service Commission,
341 U.S. 329 (1951).....12

Patterson v. McLean Credit Union,
491 U.S. 164 (1988).....23

Payne v. Tennessee,
501 U.S. 808 (1991).....23

Pike v. Bruce Church, Inc.,
397 U.S. 137 (1970).....20

Reeves, Inc. v. Stake,
447 U.S. 429 (1980).....13

USA Recycling, Inc. v. Town of Babylon,
66 F.3d 1272 (2d Cir. 1995).....9

CONSTITUTION and FEDERAL STATUTES

U.S. Const. art. I, § 8, cl. 3.....2

Resource Conservation and Recovery Act,
42 U.S.C. § 6901(a)(3).....5
42 U.S.C. § 6901(a)(4).....3
42 U.S.C. § 6902(a).....4
42 U.S.C. § 6941.....4
42 U.S.C. § 6942.....4
42 U.S.C. § 6943.....4

STATE CONSTITUTIONAL PROVISIONS and STATUTES

Wash. Const. Art. XI, § 11.....4

Ala. Code
§ 22-27-3.....10
§ 22-27-40(3).....10
§ 22-27-48.....4

Conn. Gen. Stat.
§ 22a-220.....4
§ 22a-258.....10

Me. Rev. Stat. Ann. Title 38
§ 1304-B.2.....10
§ 1305.1.....4

Minn. Stat.
§ 115A.84.....10

N. J. Stat. Ann.
§ 13:1E-2(a).....10

Ohio Rev. Code Ann.
§ 3734.52(A) and (B) 5
§ 3734.53(A) 5
§ 3734.55 5

Or. Rev. Stat.
§ 459.015(2) 10
§ 459.065 3

53 Pa. Cons. Stat.
§ 4000.303(a) 3
§ 4000.304(a) 3
§ 4000.502(f) 10

Utah Code Ann.
§ 19-6-503 4

Wash. Rev. Code
§ 70.95.080 4
§ 70.95.090(3) 4

Wis. Stat.
§ 287.13 10

MISCELLANEOUS

40 C.F.R. § 240.101(q) 2

Public Meetings on Municipal Solid Waste Flow Control, 58 Fed. Reg. 37,477 (July 12, 1993) 5

The Solid Waste Dilemma, 53 Fed. Reg. 36,883, 36,885 (1988) 24

U. S. Environmental Protection Agency, *Municipal Solid Waste in the United States: 2005 Facts and Figures* 4

U.S. Environmental Protection Agency, *Report to Congress on Flow Controls and Municipal Solid Waste*, EPA 530-R-95-008 (Mar. 1995) 4, 15, 16, 18, 22

Hearing on Flow Control Laws and Proposals to Regulate the Interstate Transportation of Municipal Solid Waste Before the Senate Comm. on Environment and Public Works, 105th Congress (Mar. 18, 1997) 6

U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda for Action*, EPA/530-SW-8-019 (Feb. 1989) 2, 6

Facing America's Trash: What Next For Municipal Solid Waste? Office of Technology Assessment 101st Congress (Oct. 1989).....5

The Cost of Flow Control – Critical Review of the National Economic Research Associates Analysis, New Hampshire Department of Environmental Services (Nov. 1995) 17, 18

U.S. Environmental Protection Agency, *Variable Rates in Solid Waste: Handbook For Solid Waste Officials*, EPA/530-SW-90-084A, Vol. I.....16

Hauling & Disposal Ranking, Waste News (July 2006) 9

Paula C. Murray and David B. Spence, *Fair Weather Federalism and America's Waste Disposal Crisis*, 27 Harv. Envtl. L. Rev.71 (2003) 24

Ann R. Mesnikoff, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste at Home*, 76 Minn. L. Rev. 1219 (1992).....24

In the

SUPREME COURT OF THE UNITED STATES

No. 05-1345

UNITED HAULERS ASSOCIATION, INC., *et al.*,
Petitioners,
v.
ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, *et al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF *AMICI CURIAE* of the ARKANSAS ASSOCIATION of REGIONAL SOLID WASTE MANAGEMENT DISTRICTS, BRISTOL RESOURCE RECOVERY FACILITY OPERATING COMMITTEE, CAPE MAY COUNTY MUNICIPAL UTILITIES AUTHORITY, CITY OF TAMPA, CONNECTICUT CONFERENCE of MUNICIPALITIES, CONNECTICUT RESOURCES RECOVERY AUTHORITY, DELAWARE COUNTY SOLID WASTE AUTHORITY, ECOMAINE, GREATER LEBANON REFUSE AUTHORITY, MARION COUNTY, OREGON, METRO REGIONAL GOVERNMENT, MINNESOTA RESOURCE RECOVERY ASSOCIATION, MONTGOMERY COUNTY, OHIO, NEW YORK STATE ASSOCIATION of COUNTIES, NORTHWEST ARKANSAS REGIONAL SOLID WASTE MANAGEMENT DISTRICT, OUTAGAMIE COUNTY, WISCONSIN, PINE BELT REGIONAL SOLID WASTE MANAGEMENT AUTHORITY, SNOHOMISH COUNTY, WASHINGTON, SOLID WASTE AUTHORITY of CENTRAL OHIO, SOLID WASTE DISPOSAL AUTHORITY of the CITY of HUNTSVILLE, SPOKANE REGIONAL SOLID WASTE SYSTEM, WASATCH INTEGRATED WASTE MANAGEMENT DISTRICT and the YORK COUNTY SOLID WASTE and REFUSE AUTHORITY

IN SUPPORT OF RESPONDENTS

Amici curiae Arkansas Association of Regional Solid Waste Management Districts, *et al.*, submit this brief in support of Respondents Oneida and Herkimer counties and the Oneida-Herkimer Solid Waste Management Authority

(referred to in common as "Oneida-Herkimer").[1] *Amici* are further described in the Appendix to this brief, and include counties, special authorities, city and regional governments and related associations responsible for (or whose members are responsible for) municipal waste management in their communities and dedicated to implementing federal and state policies that encourage "integrated waste management."[2] A fundamental tool in meeting *amici's* solid waste management responsibilities is reliance on "flow control" authority, that is, local ordinances (or regulations) which designate the recycling, waste processing and disposal facilities for serving a given community. In upholding the respective flow control ordinances of Oneida and Herkimer counties against the claim that the ordinances constitute per se discrimination under the Commerce Clause (U.S. Const. art. I, § 8, cl. 3), the two Second Circuit decisions at issue here, *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*, 261 F.3d 245 (2d Cir. 2001) (*United Haulers I*) (Pet. App. 22a-53a) and 438 F.3d 150 (2d Cir. 2006) (*United Haulers II*) (Pet. App. 1a-21a), rejected, consistent with other circuits, mechanical application of the per se discrimination standard "without reference to the unique

---

[1] No portion of this brief was authored by counsel for a party, and no person or entity other than the *amici curiae* has made a monetary contribution to the preparation or submission of this brief. The Petitioners and Respondents have each consented to the filing of this brief and their respective letters of consent have been filed with the Clerk of the Court.

[2] The term "municipal solid waste" means "residential and commercial solid wastes generated within a community." 40 C.F.R. § 240.101(q). "'Integrated waste management' refers to the complementary use of a variety of waste management practices," including reuse of products, recycling of materials, waste-to-energy combustion and landfilling "to safely and effectively handle the municipal solid waste stream with the least adverse impact on human health and the environment." *The Solid Waste Dilemma: An Agenda for Action*, U.S. Environmental Protection Agency, EPA/530-SW-8-019, at 16 (Feb. 1989) (cited below as "*Agenda for Action*").

facts of this case."[3] *Amici* respectfully urge this Court to affirm the court of appeals' judgment.

STATEMENT OF INTEREST OF *AMICI*

Amici's interest in this case arises from the ever increasing volume of municipal solid waste generated in the United States, for which primary responsibility falls on the shoulders of local government, as Congress has expressly acknowledged. In that regard, the Court has long recognized that authority over solid waste management is inherent in the police power of local government. *Cal. Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Gardner v. Mich.*, 199 U.S. 325 (1905). The Resource Conservation and Recovery Act (RCRA) codifies recognition of that police power authority, *see* 42 U.S.C. § 6901(a)(4) ("the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies"), as do the laws of essentially every state.[4] The

---

[3] *See* Pet. App. 39a, citing *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 798 (3d Cir. 1995) and *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 188 (1st Cir. 1999). The court relied on two significant distinctions between the flow control ordinances in this case and the flow control ordinance at issue in *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). First, Clarkstown's ordinance, unlike the Oneida-Herkimer ordinances, attempted to regulate disposal of waste that was merely in transit through the town (the extraterritorial aspect of the Clarkstown ordinance was the only issue for which review by this Court was sought in *Carbone*). *See* Pet. App. 42a, n.4. Second, selection of the publicly-owned facilities to which the Oneida-Herkimer ordinances directed waste was not the result of favoritism for the benefit of local private business interests but rather because, as the record demonstrates, in directing waste to the Oneida-Herkimer facilities, the Counties' flow control ordinances fulfill an essential governmental responsibility. *Id.* at 23a-30a.

[4] *See, e.g.*, Or. Rev. Stat. § 459.065 (broad authority conferred on local government for solid waste management, which is "a matter of statewide concern"); 53 Pa. Cons. Stat. §§ 4000.303(a), 4000.304(a) (Pennsylvania municipalities have primary responsibility for processing and disposal of locally generated municipal waste); Me. Rev. Stat. Ann. Title 38, § 1305.1 ("Each municipality shall provide [for] solid waste disposal

volume of municipal waste generated in the United States has increased by more than 50 percent since 1980, exceeding 245.7 million tons in 2005, *Municipal Solid Waste in the United States: 2005 Facts and Figures*, U.S. EPA (*available at* http://epa.gov/epaoswer/non-hw/muncpl/msw99.htm), and managing municipal solid waste in an environmentally-protective and efficient manner is a difficult task that requires significant state and local government resources. *Carbone*, 511 U.S. at 385; *see also Or. Waste Sys. v. Dep't of Envtl Quality*, 511 U.S. 93, 109 (1994) (describing municipal waste management as a "vexing national problem") (Rehnquist, C.J., dissenting).

The Nation's growing waste stream requires comprehensive planning by local government to address the broad range of public health, environmental and economic issues involved. For that reason, a principal RCRA objective is detailed state and local solid waste management planning, including emphasis on assuring capacity adequate to meet the affected communities' "present and reasonably anticipated future needs." 42 U.S.C. § 6941; *see also id.* §§ 6902(a)(1), 6942 and 6943.[5] Such planning must

---

services for domestic and commercial solid waste generated within the municipality"); Ala. Code § 22-27-48 (counties and municipalities responsible for assuring proper management of solid waste); Conn. Gen. Stat. § 22a-220 (each municipality responsible for arranging for solid waste collection and disposal); Utah Code Ann. § 19-6-503 (all counties, special service districts and municipalities must provide adequate capacity for solid waste generated within their jurisdiction). *See also* Wash. Const. art. XI, § 11 (Washington municipalities granted sanitation authority equivalent to authority of the state legislature).

[5] EPA has noted RCRA's "great emphasis" on state, regional and local planning, which, among other things, "must provide for adequate recycling and disposal capacity and must address [waste management] facility planning and development." *Report to Congress on Flow Controls and Municipal Solid Waste*, U.S. EPA, EPA 530-R-95-008, at 1-2 (Mar. 1995), *available at* http://www.epa.gov/epaoswer/non-hw/muncpl/flowctrl.htm (cited below as "*Report to Congress on Flow Control*"). *See also* Wash. Rev. Code §§ 70.95.080 and 70.95.090(3) (each county to prepare a comprehensive solid waste management plan

consider the broad range of public health, environmental and economic issues involved, and "present[s] these communities with serious financial, management, intergovernmental, and technical problems." *See* 42 U.S.C. § 6901(a)(3). These factors represent a reality of solid waste management which may be referred to as "The Second Law of Garbage": More specifically, absent government intervention, management of municipal solid waste will generally default to the lowest cost (in terms of short-term costs) and frequently less environmentally sound alternatives. *See Facing America's Trash: What Next For Municipal Solid Waste?*, Office of Technology Assessment 101st Cong., at 275 (Oct. 1989); *see also Agenda for Action* at 8 (describing the "First Law of Garbage" as "Everybody wants us to pick it up, and nobody wants us to put it down"). Flow control changes that dynamic by facilitating implementation of the environmentally-preferable waste management infrastructure alternatives selected by the affected community. *See* Public Meetings on Municipal Solid Waste Flow Control, 58 Fed. Reg. 37,477, 37,478 (July 12, 1993) (noting the more active role of state and local government in integrated waste management planning, EPA refers to flow control as a "key tool" for implementing such plans).

This is the context in which each of the *amici* (and the members of the association *amici*) – as well as many other local governments – have turned to flow control to effectuate their waste management decisions, including selection of the

---

including "a program for the orderly development of solid waste handling facilities in a manner consistent with plans for the entire county" and "a plan for financing both capital costs and operational expenditures"); Ohio Rev. Code §§ 3734.52(A) and (B), 3734.55 and 3734.53(A) (each county required to participate in a solid waste district for the purpose, among other things, of preparing a solid waste management plan providing for proper management of municipal solid waste and certifying availability of sufficient solid waste management capacity to serve county's residents for ten-year minimum period).

waste management facilities best suited for their communities (whether a recycling center, resource recovery – also referred to as "waste-to-energy" – facility, composting plant, waste transfer station or another type of waste management infrastructure). Thus, since 1980 a considerable number of local governments have relied on flow control authority in issuing more than $20 billion in public debt for the construction of state-of-the-art, environmentally protective waste management infrastructure. *Hearing on Flow Control Laws and Proposals to Regulate the Interstate Transportation of Municipal Solid Waste Before the Senate Comm. on Environment and Public Works*, 105th Cong. (Mar. 18, 1997) (Testimony of Randy Johnson, Chair, Board of County Commissioners Hennepin County, Minnesota and President-Elect, National Association of Counties). Such environmentally advanced waste management systems are quite expensive and often extremely difficult to develop and operate without use of flow control. Flow control ordinances implement the affected communities' determinations regarding the facilities that will best achieve their waste management strategies. While the community's choices may self-impose more short-term expense, the use of flow control is a highly cost effective and efficient means for the community to counteract the attraction of the lower short-term costs of environmentally less preferable alternatives.

The circumstances in which *amici* and Respondents turned to flow control to meet their governmental responsibility for solid waste management are very similar and have the primary objective of maximizing waste reduction, recycling and reuse. *See* Resp. Br. 3-8. *See also Agenda for Action* at 16-21 (describing hierarchy of waste management methods, which are, in order of priority, waste reduction and minimization, recycling, energy recovery, and sanitary landfill disposal). Contrary to Petitioners and their *amici*, neither the Respondents nor any of the *amici* are in

the "business of selling waste disposal services." Instead, *amici*, like Respondents, have primary responsibility for municipal solid waste management in their communities, and flow control is a fundamentally important tool in meeting that core governmental responsibility for protection of public health and the environment.

SUMMARY OF ARGUMENT

The Second Circuit should be affirmed because the court correctly recognized the vital role of flow control in facilitating local government's solid waste management responsibility. In meeting their responsibilities, local governments do not compete with private companies such as Petitioners, and the solid waste management decisions and actions of local governments bear no resemblance to the entrepreneurial activity of private businesses engaged in waste collection and disposal.

As shown in the record here, flow control authority, in facilitating Respondents' ability to satisfy their statutory responsibilities for solid waste management, neither discriminates against interstate commerce nor implicates the protectionism concerns that underlie this Court's dormant Commerce Clause jurisprudence. Moreover, communities that rely on flow control provide distinctly different and considerably more comprehensive waste management services in comparison to the Petitioners' narrower waste collection-disposal business enterprises, and those differences further preclude Petitioners' discrimination claim. Finally, the tax subsidy and similar alternatives advocated by Petitioners would have the same – or even more – impact on commerce (as opposed to less impact) than flow control. Under such circumstances, the authority to choose between alternatives for meeting their public service obligations resides with Respondents and other states and localities responsible for municipal waste management.

ARGUMENT

The Second Circuit Correctly Ruled That The Oneida-Herkimer Flow Control Ordinances Do Not Facially Discriminate Against Or Unduly Burden Commerce And Petitioners' Contrary Arguments Misapprehend Local Government Responsibility For Solid Waste Management

A. Local Government's Solid Waste Management Responsibility Bears No Resemblance To Entrepreneurial, For-Profit Activity

A principal theme of Petitioners' brief is their repeated assertion that Oneida-Herkimer is in "the business of selling waste disposal services to private haulers" (Pet. Br. 36) and uses flow control "to shield [its] market activities from interstate competition." *Id.* at 12; *see generally id.* at 11-12, 23, 35-37. Petitioners' contentions are invalid and disregard a fundamental principle: In implementing their core governmental responsibility for solid waste management, local governments are not "in competition" with Petitioners and are not engaging in "market activities." Petitioners' characterizations of Oneida-Herkimer's integrated waste management system as "protectionist" also ignore the fact that under this Court's dormant Commerce Clause jurisprudence local government actions in furtherance of a core governmental function that treat all out-of-state interests on the same basis as in-state interests are not protectionist.[6]

---

[6] Petitioners' contentions should be taken with more than a few grains of salt given private waste companies' strong endorsement of flow control in other cases. For example, in Vince Refuse Serv., Inc. v. Clark County Solid Waste Mgmt. Dist., No. C-3-93-319, which Petitioners cite in their brief (Pet. Br. 39 n.11), Waste Management, Inc. of Ohio (WMI) described the flow control regulations at issue as follows:

> The record portrays that the local benefits of the District's waste flow rules and incentive fee system are substantial. . . . It is the basis of the County's ability to plan and execute long- and short-term disposal arrangements. As such it is indispensable. . . . These

1. As noted above, local government responsibility for solid waste management, including the use of flow control, is the opposite of the for-profit, entrepreneurial activity that is traditionally performed by private businesses and, instead, has longstanding recognition as a core government function. *See Cal. Reduction Co.*, 199 U.S. 306; *Gardner*, 199 U.S. 325; s*ee also City of Philadelphia v. New Jersey*, 437 U.S. 617, 621 n.4 (1978); *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1275 (2d Cir. 1995) (it is settled law that "garbage collection and disposal is a core function of local government in the United States"). In that regard, flow control ordinances implement delegated state police power authority for protection of public health, welfare, safety and

---

> rules are part of a comprehensive long-term effort to deal with health, safety and environmental problems associated with solid waste disposal in Clark County.
>
> . . .
>
> The contested rules and regulations in this case are not protectionist measures and are directed to legitimate local concerns that do not have *any* effect upon interstate commerce that is more than merely incidental. Indeed, there is no indication in the record that WMI's actions are protective measures designed to discriminate against interstate commerce. The effect on interstate commerce, if any, is only minimal. The record does not indicate that any national or regional market is substantially effected [sic] by the District's rules. The only identifiable costs are local.

Mem. of Intervenor, Waste Management of Ohio, Inc., at pp. 24 and 33, Vince Refuse Serv., Inc. v. Clark County Solid Waste Mgmt. Dist., No. C-3-93-319 (S.D. Ohio Mar. 9, 1994) (original emphasis). These are not the transient statements of a disinterested third party. To the contrary, Waste Management of Ohio is part of the largest U.S. waste company, Waste Management, Inc., *see Hauling & Disposal Ranking*, Waste News, July 17, 2006, at 15-19, which, in turn, is the largest member of *amicus* National Solid Wastes Management Association (NSWMA), *see* http://www.wastec.org/impak/eia/main/member_list.asp?action=start&aff=nswm, and NSWMA is paying each of the Petitioners' legal fees in this litigation. United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., No. CV-95-0516 (N.D.N.Y.), Deposition of Mark Berkman, Ph.D., Feb. 11, 2003 ("Berkman Dep."), Tr. 10 (statement by United Haulers' counsel).

the environment. *See, e.g.*, Ala. Code §§ 22-27-3 and 22-27-40(3); Conn. Gen. Stat. § 22a-258; N.J. Stat. Ann. § 13:1E-2(a); Or. Rev. Stat. § 459.015(2). This point is evident from state laws authorizing flow control.

For example, in Wisconsin a prerequisite to a municipality's use of flow control is a finding that flow control "is in the best public interest," which in turn requires a determination that use of designated waste management facilities will, among other things, conserve energy or natural resources, lessen demand for solid waste disposal facilities, and that the alternatives to flow control "have been compiled, analyzed and considered." Wis. Stat. § 287.13. Under Minnesota's comparable statute, use of flow control requires the affected local government to prepare a plan demonstrating that flow control "will better serve to protect public health and safety" and is necessary to achieve local waste management plans and policies. Minn. Stat. § 115A.84, subd. 2. *See also* 53 Pa. Cons. Stat. § 4000.502(f) (as a prerequisite to exercise of flow control, a county's solid waste management plan must "[e]xplain in detail the reason for selecting such facility," "provide reasonable assurances that the county utilized a fair, open and competitive process for selecting such facilities or programs from among alternatives which were suggested to the county," and "[e]valuate [for the affected facility] the environmental, energy, life cycle cost, [and] the costs of transportation . . . as well as the [costs of the] alternatives."); Me. Rev. Stat. Ann. Title 38, § 1304-B.2 ("[M]unicipalities are expressly authorized to enact ordinances that control solid waste . . . delivery to a specific facility, when the purpose and effect of such an ordinance is to gain management control over solid waste and enable the reclamation of resources, including energy, from these wastes.").

This is the context in which the court of appeals concluded in *United Haulers I* that the Counties' flow

control ordinances do not facially discriminate under the dormant Commerce Clause. As the Second Circuit explained, "[t]he common thread in . . . dormant Commerce Clause jurisprudence," which is not present in this case, is where "a local law discriminates against interstate commerce [by] . . . hoard[ing] local resources *in a manner* that favors local business, industry or investment over out-of-state competition." Pet. App. 47a (original emphasis). *Accord, Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179-80 (1995) (describing purpose of Commerce Clause as preventing a state from placing "burdens on the flow of commerce across its borders *that commerce wholly within those borders would not bear*") (emphasis added); *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988) ("This 'negative' aspect of the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."); *Philadelphia v. New Jersey*, 437 U.S. at 629 ("The New Jersey law blocks the importation of waste in an obvious effort *to saddle those outside the State with the entire burden* of slowing the flow of refuse into New Jersey's remaining landfill sites") (emphasis added).

In contrast, selection of a single service provider to the exclusion of all others – both in-state and out-of-state – to provide essential services to the public, which is the precise result of flow control, is not discrimination under the dormant Commerce Clause. *See Houlton Citizens' Coalition*, 175 F.3d at 188 ("We do not interpret *Clarkstown* [*Carbone*] as explicating a broad-based ban on every flow-control ordinance that happens to be coupled with an exclusive contractual arrangement in favor of an in-state operator"); *Harvey & Harvey*, 68 F.3d at 798, 803 ("That [an] ordinance requires the use of [a] selected facility . . . (which may be out of state), does not itself establish a Commerce Clause violation" because "local governments have the capacity, in the practical exercise of their police powers, which are at their strongest in the health and safety area, to contract with

specific businesses to provide certain services"). On such bases the Court has recognized that state and local governments may, consistent with the dormant Commerce Clause, restrict private companies' access to local markets where the public interest is better served by a single provider or public service monopoly. Thus, in *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U.S. 329, 336-37 (1951), the Court rejected a dormant Commerce Clause challenge to a state regulation restricting the direct sale of natural gas to the holder of a certificate of public convenience and necessity authorizing such sales, explaining that "[a]lthough the end result might be prohibition of particular direct sales, . . . it is no discrimination against interstate commerce for Michigan to require . . . sales of gas through the existing certificated utility where public convenience and necessity would not be served by direct sales" and the underlying statute "does not distinguish between an interstate or intrastate agency."

2. The importance of local government's traditional, core responsibility for solid waste management is all the more acute in this case given the fundamental difference between the motivations that underlie for-profit entrepreneurial activity in comparison to the public health and safety responsibilities that underlie flow control ordinances. Thus, flow control does not present a situation in which local governments are engaging in "a business activity . . . activity in which a profit is realized." *See City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 418 (1978) (Burger, C.J., concurring) (internal quotations omitted). Similarly, "there is no valid comparison between, on the one hand, the State's [favoring] . . . an enterprise devoted to the making of profit and, on the other hand, the State's . . . [favoring] an enterprise which, for the purpose at hand, has the same objective as the State itself (the expenditure of funds for social welfare)." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 605 n.4 (1997) (Scalia, J., dissenting).

Nor is it correct for Petitioners to suggest that public ownership of waste management facilities is important as an end in itself. *See* Pet. Br. 27 ("In the [Second Circuit's] view, the concerns animating [the Court's dormant Commerce Clause] cases disappear when the favored facility is owned by a public entity"); *see also id.* at 2, 3, 11-12, 25-26. Thus, contrary to Petitioners' contention that *United Haulers I* represents a "formalistic" or legal title-driven standard, the essential point in this case is the clear demonstration in the record that the Counties' flow control ordinances direct waste to the Oneida-Herkimer facilities in furtherance of "a comprehensive waste management system . . . to provide for the safe and cost-effective disposal of their residents' solid waste," *United Haulers I*, Pet. App. 24a, and the outcome does not change depending on whether legal title to such facilities is nominally public or private. Put another way, private ownership does not in and of itself preclude a facility from serving the public interest any more than a local government's public entity status guarantees that its actions will always serve the public interest. *See City of Lafayette v. La. Power*, 435 U.S. at 418-22 (Burger C.J., concurring).

It bears emphasis that restrictions which may arise under the dormant Commerce Clause when "the State is acting . . . [as] a traditionally 'private enterprise,'" such as "conduct that the State realistically could choose to abandon, that is undertaken for profit, that is traditionally performed by private citizens and corporations, and that otherwise resembles the behavior of 'market participants,'" *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 684-85 (1999), have no resemblance to Oneida-Herkimer's – or *amici's* – use of flow control. To the contrary, the public service obligations that local governments fulfill through the exercise of flow control are not, needless to say, an obligation of any private enterprise engaged in solid waste collection or disposal. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 447 n.1 (1980), Powell,

J., dissenting ("By 'protectionism,' I refer to state policies designed to protect private economic interests within the State from the forces of the interstate market," and "I would exclude from this term policies relating to traditional governmental functions"). And in implementing its responsibilities, no local government can "pick out good portions of a particular territory, serve only select customers . . . , and refuse service to other users." *Gen. Motors v. Tracy*, 519 U.S. 278, 297 (1997) (internal citation omitted). In short, local governments that rely on flow control do not undertake their solid waste management responsibilities for profit, entrepreneurial spirit or the like, but rather to satisfy one of their most basic governmental obligations.[7]

B. The Considerable Difference Between Petitioners' Collection-Disposal Businesses And Respondents' Integrated Waste Management Service Further Precludes Any Notion Of Discrimination

Petitioners' discrimination claim is also belied by the Court's recognition in *General Motors v. Tracy* that under the dormant Commerce Clause "any notion of discrimination assumes a comparison of substantially similar entities." 519 U.S. at 298. The Court addressed this matter as follows:

> Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities. Although this central assumption has more often than not itself remained dormant in this Court's opinions on state discrimination subject to review under the dormant Commerce Clause, when the allegedly competing entities provide different products, as here, there is a threshold question whether the companies are

---

[7] *See United Haulers I*, Pet. App. 52a-53a ("[T]his case deals with waste processing by a publicly owned facility. Waste disposal is both typically and traditionally a local government function . . . Whether the same analysis would apply to activities that are not traditionally governmental is not before us.") (Calabresi, J., concurring).

> indeed similarly situated for constitutional purposes. This is so for the simple reason that the difference in products may mean that the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed.

Id. at 298-99; s*ee generally id.* at 297-303. The importance of comparing substantially similar entities has particular application in the context of flow control. That is because local governments that rely on flow control typically provide a comprehensive array of statutorily-mandated waste management services which go well beyond the narrower waste collection-disposal business enterprise that underlies Petitioners' claim of discrimination. *See United Haulers I,* Pet. App. 29a-30a.

More specifically, the waste management functions performed by local governments that rely on flow control (including *amici*) will typically comprise, in addition to disposal of non-recyclable waste, a number of environmentally-essential services such as recycling, household hazardous waste programs, yard waste collection, related educational programs and comprehensive planning. As noted earlier (*see supra* n.2), such recycling and related services are referred to as "integrated waste management" (IWM) services. Because these services "generally do not lend themselves to generation of their own revenues," *Report to Congress on Flow Control* at ES-11 (*see also id.* at III-80), the affected local governments charge a "system" fee which, although imposed only on disposal of non-recyclable waste, supports the full array of integrated waste management services provided. This point is addressed by Oneida-Herkimer's expert witness, Dr. Robert Stavins:

> All Authority activities are financed by a system charge levied on non-recyclable waste together with revenues derived from the sale of recyclable materials. Authority "tipping fees" for disposal of non-recyclable waste are set so as to assure that revenues are sufficient to cover

> the Authority's overall costs, and are generally higher than tipping fees charged by disposal facilities which do not provide or support similar recycling or other services.

J.A. 357a-358a (¶ 9); *see also id.* at 376a (¶ 42), 381a (¶ 49) ("[T]hese programs are supported by the system charge on non-recyclable waste and are not structured to generate fee revenue, but to encourage greater separation and delivery of material," and "charging tipping fees for non-recyclable waste that support all waste system components, and not charging fees for delivery of recyclables . . . [or yard waste and household hazardous waste collection programs, education, etc.], provides greater incentives not only for complying with recycling laws, but also for reductions in the generation of waste.").[8]

Addressing the same point in its *Report to Congress on Flow Control*, EPA explains (with reference to waste-to-energy facilities) that "[d]ue to flow control," the affected local governments' system fees "often cover other municipal system costs (e.g., curbside recycling). In contrast, private regional landfills are more likely to set tipping fees at (lower) levels that recover disposal costs only." *Report to*

---

[8] Thus, in addition to supporting environmentally beneficial programs that cannot generate their own revenues, *see Report to Congress on Flow Control, supra,* flow control also provides financial incentives for waste reduction and recycling that are not possible through other means such as tax subsidies, which do not create the same difference in relative prices that comes with increasing the price for waste disposal. J.A. 388a-389a (¶ 60). *See also* United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., No. CV-95-0516 (N.D.N.Y.), Deposition of Robert N. Stavins, Feb. 13, 2003, Tr. 197 (incentive for waste reduction that results from pricing waste disposal "above marginal cost . . . could not be sustained in a private market in the absence of . . . flow control."); *Variable Rates In Solid Waste: Handbook For Solid Waste Officials*, U.S. EPA, EPA/530-SW-90-084A, Vol. I–Exec. Summ. 2 (Sept. 1990) (discouraging use of local taxes, such as property taxes, to support solid waste management services because such use of property taxes fails to give "residents *any* incentive to reduce their waste" (original emphasis)).

Congress on Flow Control at III-51; *see also United Haulers I*, Pet. App. 25a ("tipping fee" refers to the waste disposal charge or gate fee at a disposal facility). Similarly, in *The Cost of Flow Control – Critical Review of the National Economic Research Associates Analysis (May 1995)*, New Hampshire Department of Environmental Services (Nov. 1995) (cited below as "*NHDES Report*"), the agency emphasizes that the system fees charged by flow control-reliant communities will almost always recover, in addition to the cost to dispose of non-recyclable waste, the costs of environmentally-essential services such as recycling, household hazardous waste collection and public education. *NHDES Report* at 1.[9] "The public typically views IWM programs funded through [system] fees as a 'free' addition to locally provided waste management service," and, accordingly, "they tend to use these programs more heavily than if recycling, HHW [household hazardous waste] collection, composting, and other IWM programs were billed on a fee-for-service basis." *Id.* As the *NHDES Report* also explains, it is "the duty of public authorities to respond to public (and frequently legislative) mandates to provide these services." *Id.* at 4.[10]

Putting this matter in context, Petitioners' failure to recognize the significant difference between their collection-

---

[9] The May 1995 study that the New Hampshire DES examined, *The Cost of Flow Control*, National Economic Research Associates, is in the record and was a reference source for the report of appellants' expert, Dr. Mark P. Berkman (Dr. Berkman was an author of *The Cost of Flow Control*). *See* J.A. 204a & n.16, 218a (¶ 3). Pursuant to Rule 32.3, *amici* have submitted a letter to the Clerk of the Court requesting permission to lodge the *NHDES Report* with the Court.

[10] Petitioners' position (as explained by their expert witness) is that even though use of a system fee encourages recycling, they "don't know if recycling is a benefit" and the "undifferentiated tipping fees [system fees] often associated with flow control lead to inefficient levels of recycling and hide the true cost of recycling." Berkman Dep., Tr. 139, 141; J.A. 204a.

disposal business enterprises and the statutorily-driven integrated waste management services provided by flow control reliant communities "ignore[s] what is probably the single most important variable that differentiates public, flow-controlled facilities from private disposal sites" and results in a "false comparison" of "apples to watermelons and the comparison is invalid." *See NHDES Report* at 2, 4. Thus, in contrast to the narrow waste collection-disposal service that underlies Petitioners' discrimination claim, communities that rely on flow control provide considerably more comprehensive waste management services, and that substantial dissimilarity precludes "any notion of discrimination." *See General Motors*, 519 U.S. at 298.[11]

---

[11] Like their discrimination claim, Petitioners' argument that flow control increases costs, *see, e.g.*, Pet. Br. at 5 (in which *amici* NSWMA, *et al.*, join), is based on the same illogical comparison of disposal-only tipping fees (at landfills and transfer stations) with *system* fees, such as Oneida-Herkimer's, which support an integrated system of environmentally-essential services. In fact, when properly analyzed on an equivalent service basis, communities that rely on flow control do not pay more for their waste management services than non-flow control communities. Thus, as EPA has explained, when tipping fees charged for flow control-reliant and non-flow control facilities are "'broken down into [their] component parts, prices are usually comparable for facilities sited in similar locations and built about the same time.'" *Report to Congress on Flow Control* at III-57 (quoting Moody's Public Finance, *Perspectives on Solid Waste*, at 3 (Aug. 16, 1993)). That point is also demonstrated in the record: Oneida-Herkimer's cost for transportation and disposal of non-recyclable waste ($46 per ton) is more than ten percent below the average tipping fee for disposal of solid waste at private transfer stations in New York state. *See* J.A. 17a, Dkt. Entry No. 172, Exh. 27, p. 195; J.A. 214a (¶ 45). *See also id.* at 365a-366a (¶ 24). In addressing this very point, the *NHDES Report* explained that "[t]o yield an accurate comparison of tipping fees at public, flow-controlled disposal facilities against those at private facilities," it is necessary to "identif[y] and eliminate[] the costs of IWM programs at the flow-controlled facilities, or add[] the cost of comparable IWM programs to the reported tipping fees at private facilities." *NHDES Report* at 2.

C. Petitioners' Suggested Alternatives To Flow Control Would Have The Same Effect On Commerce, Which Further Belies Petitioners' Discrimination And Undue Burden Claims

Although flow control has minimal impact on interstate commerce (and, if anything, the impact is positive, *see infra* pp. 22-23), Petitioners nevertheless argue that "respondents could finance their waste management facilities without imposing any regulatory restrictions on interstate trade," (Pet. Br. 43) and cite their expert witness report, which says ""[t]axes, fees, regulations, and contracts are effective means to meet the objectives of . . . flow control" and "[t]hese means have much less impact on interstate commerce." J.A. 215a; *see also* Pet. Br. at 11, 18. The record, however, including Petitioners' witness's testimony, refutes Petitioners' argument.

Thus, as already noted (*supra* n.11) Oneida-Herkimer's costs for transportation and disposal of non-recyclable waste are quite competitive and would not require flow control if that service was offered in isolation from the rest of Oneida-Herkimer's integrated waste management services. For that reason, the subsidies suggested by Petitioners would be directed to recycling and similar services which, as discussed above (*see supra* pp. 15-18), do not lend themselves to generation of their own revenues. Petitioners' expert witness (Dr. Berkman) addressed this point when he suggested that taxes could be used in lieu of flow control to subsidize the non-disposal portions of the Oneida-Herkimer system:

> Well, the tax revenues that would be collected in that process *could be put to exactly the same purposes the current tipping fees are being put to*, at least those tipping fees in excess of the actual disposal costs.
>
> Those additional fees right now are used to finance the recycling and education program.

Berkman Dep., Tr. 155 (emphasis added). Put another way, and as Petitioners themselves recognize, changing from flow control to a system of disposal fees and tax subsidies for recycling and other programs would not change the impact on commerce because the very same recycling, waste processing and disposal facilities would be used (albeit, less material would be recycled and more would require disposal).

In fact, when this precise point was raised below Petitioners were relegated to arguing (given their witness's testimony) that if flow control's impact on commerce is the same as Petitioners' alternatives, "then it proves that the flow control provisions are unnecessary . . . [b]ecause the Counties can achieve their waste management goals without banning interstate trade in waste processing and disposal." Reply Brief of Plaintiffs-Appellants at 17, United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., No. 05-2024 (2nd Cir. Oct. 3, 2005). Petitioners' position is invalid on several bases. First, Petitioners disregard the fact, noted above (*see supra* note 8, *see generally* pp. 16-18), that flow control provides a significantly greater incentive for recycling in comparison to tax subsidies. In addition, other alternatives indisputably have greater impact on commerce than flow control. *See United Haulers II*, Pet. App. 6a (Petitioners "conceded at oral argument that the Counties could create a public monopoly encompassing the entire waste management process, thereby displacing private firms altogether, without violating the Commerce Clause").

But at least equally important, Petitioners ignore the relevant inquiry under the dormant Commerce Clause, which is whether there are available *nondiscriminatory* alternatives that have *less* impact on commerce. *See Oregon Waste Sys.*, 511 U.S. at 100-01 (enforcement of a discriminatory regulation may be precluded if nondiscriminatory alternatives available); *New Energy Co.*, 486 U.S. at 278 (same); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)

(extent of burden tolerated will depend on the nature of the local interest involved and "whether it could be promoted as well with a lesser impact on interstate activities").[12] Petitioners' alternatives (e.g., tax subsidies) are, unlike flow control, non-regulatory, but they are surely no less burdensome or discriminatory than flow control (which, in fact, is neither discriminatory nor burdensome) because they would result in use of the very same facilities. In such circumstances, the choice among alternatives is not for the courts, however, but rather for Oneida-Herkimer and other states and localities responsible for municipal waste management. *See Locomotive Firemen v. Chicago, R.I. & P.R. Co.*, 393 U.S. 129, 142 (1968) ("If there are alternative ways of solving a problem, we do not sit to determine which of them is best suited to achieve a valid state objective." (*quoting Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959)); *see also Camps Newfound/Owatonna*, 520 U.S. at 603 n.3 ("Where regulatory discrimination against out-of-state interests is appropriate, the negative Commerce Clause is not designed to push a State into nonregulatory discrimination instead.") (Scalia, J., dissenting).

D. Petitioners' Undue Burden Argument Ignores The Record

Finally, the premise for Petitioners' "undue burden" argument is that "widespread adoption of the flow-control measures at issue would virtually eliminate the movement of waste between jurisdictions." Pet. Br. 44 (internal citations

---

[12] *See also Minn. v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981) (referring to the "substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems," the Court upholds a Minnesota statute banning the retail sale of milk in plastic non-recyclable containers and rejects alternatives that "are either more burdensome on commerce" or, in comparison to the statute at issue, "less likely to be effective (as, for example, providing incentives for recycling).").

omitted); *see generally id.* at 42-44. Petitioners' argument has no merit.

As an initial matter *amici* would note that despite a remand spanning more than three years with extensive discovery, *see United Haulers II*, Pet. App. 7a, Petitioners cannot point to any evidence to support their position. In that regard, there is no evidence suggesting that Oneida-Herkimer's use of flow control has decreased the level of interstate waste shipments that would have taken place in the absence of flow control (if anything, the record shows the opposite), and Petitioners do not dispute that Oneida-Herkimer has increased interstate commerce in recyclables. J.A. 362a-363a (¶ 19), 371a-372a (¶ 34). Moreover, other local governments' replication of Oneida-Herkimer's use of flow control through operation of publicly-owned transfer stations could "increase[] interstate commerce and . . . competition in the waste disposal marketplace" by facilitating interstate shipment of waste that was previously disposed locally (and Oneida-Herkimer's future use of flow control in connection with its publicly-owned landfill will likely lead to a reduction in disposal fees in the private-sector marketplace). *Id.* at 372a-373a (¶¶ 34, 36); *see also id.* at 393a (¶ 67). In addition, communities that use flow control place significant reliance on private enterprise, and in many instances the affected recycling, resource recovery and other facilities are privately owned and/or operated, and procured through competitive bidding. Thus, as EPA has noted, "the private sector has an ownership or operational role for 84 percent of WTE [waste-to-energy] throughput, including most of the larger WTEs," *Report to Congress on Flow Control* at III-58, which complements Petitioners' witness's recognition of the correlation between reliance on flow control and development of waste-to-energy facilities. J.A. 202a n.12.

Giving the lack of evidence, Petitioners try to support their argument by misstating Justice O'Connor's separate

opinion in *Carbone* and ignoring the fact that the flow control ordinance at issue there, unlike the ordinances here (or any other flow control ordinance of which *amici* are aware), attempted to regulate disposal of waste that was merely in transit through the Town of Clarkstown. Specifically referring to that unique aspect of the ordinance ("Under Local Law 9 . . . waste from New Jersey . . . must be transported to Clarkstown's [New York] transfer facility"), 511 U.S. at 407, Justice O'Connor noted that "the practical effect of [Local Law 9] must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of the other States and what effect would arise if not one, but many or every, [jurisdiction] adopted *similar* legislation." *Id.* at 406 (internal quotations omitted; emphasis added). On that basis Justice O'Connor concluded that "[i]f . . . localities in [other] States impose *the type of restriction* on the movement of waste that Clarkstown has adopted, the free movement of solid waste in the stream of commerce will be severely impaired." *Id.* (emphasis added). In this case, however, Petitioners "have not argued that the [Oneida-Herkimer] ordinances – which apply only to waste generated in [the] . . . Counties – conflict in any respect with the regulatory requirements imposed by any other jurisdiction." *United Haulers II*, Pet. App. 10a. Thus, Petitioners' argument is not only inapposite to this case, but to the use of flow control generally.[13]

---

[13] *Amici* would also note that Petitioners' *stare decisis* argument (Pet. Br. 37-41) misstates this Court's precedent. Contrary to Petitioners, the reference to "special force" in *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989), specifically excludes "the context of constitutional interpretation." A reduced role for *stare decisis* "is particularly true in constitutional cases[] because in such cases correction through legislative action is practically impossible." *Payne v. Tenn.*, 501 U.S. 808, 828 (1991) (internal citations and quotations omitted). *See also Camps Newfound/Owatonna, Inc.*, 520 U.S. at 636-37 (Thomas, J.,

In sum, flow control reflects a commendable cost-internalizing policy by which local governments assume responsibility for management of the solid waste their citizens generate. *See* Paula C. Murray and David B. Spence, *Fair Weather Federalism and America's Waste Disposal Crisis*, 27 Harv. Envtl. L. Rev. 71 (2003); *see also,* The Solid Waste Dilemma, 53 Fed. Reg. 36,883, 36,885 (1988) (EPA encourages state and local government to "assume responsibility for the wastes generated within their jurisdictions," including participation in substate and multi-state management solutions (such as Oneida-Herkimer's bi-county authority)). Given that "[w]aste is neither a natural resource nor in short supply," Ann R. Mesnikoff, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste at Home*, 76 Minn. L. Rev. 1219, 1244, n.116 (1992), "the cumulative effect" of reliance on flow control, "particularly in furtherance of effective waste management, will only be positive." *Id.*

---

dissenting) ("Precedent as unworkable as our negative Commerce Clause jurisprudence has become is simply not entitled to the weight of *stare decisis*."). Petitioners' argument is further refuted by their concession that Respondents could entirely displace private waste collection-disposal firms, without violating the Commerce Clause, by establishing a public monopoly, *United Haulers II*, Pet. App. 6a, as well as the fact that various court of appeals decisions, in addition to the Second Circuit here, have been favorable to local government in flow control cases. *See, e.g., Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt.*, 389 F.3d 491 (5th Cir. 2004); *Maharg, Inc. v. Van Wert Solid Waste Mgmt. Dist.*, 249 F.3d 544 (6th Cir. 2001); *Houlton Citizens' Coal*, 175 F.3d 178 (1st Cir. 1999), *Harvey & Harvey*, 68 F.3d 788 (3d Cir. 1995). Petitioners also implicitly acknowledge that the "sea change" they foresee (which *amici* submit would be positive) has not arisen in the more than five years since *United Haulers I* was decided.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

Scott M. DuBoff
Wright & Talisman, P.C.
1200 G Street, N.W., Suite 600
Washington, D.C. 20005-3802
(202) 393-1200

December 2006 Counsel for Amici Curiae
(Additional Counsel Listed on Inside Cover)

Appendix – Description of Amici

The Arkansas Association of Regional Solid Waste Management Districts was organized in 1994. Among other things, the association encourages integrated waste management (IWM) for the state's seventeen regional solid waste management districts and facilitates common solutions to municipal solid waste management problems. Various association members rely on flow control as a key solid waste planning and management tool.

Bristol Resource Recovery Facility Operating Committee (BRRFOC) was established in 1985 to advance IWM in fourteen Connecticut cities and towns with an estimated population of more than 300,000. BRRFOC has relied on flow control authority as a fundamental tool for its IWM system, which includes public education on waste reduction and avoidance, recycling and household hazardous waste collection, and a state of the art waste-to-energy (WTE) facility.

Established in 1972, Cape May County Municipal Utilities Authority (CMCMUA) provides solid waste (and sanitary wastewater) management for all municipalities of Cape May County, New Jersey (peak summer population of more than 600,000). CMCMUA's IWM system has traditionally relied on flow control and includes aggressive recycling (achieving a 59% recycling rate in 2005), waste reduction and household hazardous waste collection programs, which are subsidized by a system fee on solid waste disposal. CMCMUA also reclaims energy through landfill gas recovery.

The City of Tampa, Florida's integrated waste management system encompasses recycling and household hazardous waste programs as well as the state-of-the-art McKay Bay WTE Facility. The City's integrated system has relied on flow control since 1985.

Founded in 1966, the Connecticut Conference of Municipalities (CCM) has 140 member municipalities representing 90 percent of Connecticut's population. CCM represents its members before the Connecticut General Assembly, executive branch and regulatory agencies and in state and federal courts in matters of significant public policy concern, such as the important flow control issues presented in *United Haulers v. Oneida-Herkimer*.

The Connecticut Resources Recovery Authority (CRRA) is a quasi-public state agency established in 1973 to modernize Connecticut's solid waste disposal system. Serving 118

Connecticut cities and towns with a population of more than 2.4 million, CRRA's comprehensive system includes four state-of-the-art WTE facilities, two regional recycling centers, twelve transfer stations and two interactive education centers. CRRA has relied on flow control authority to carry out its statutory directive to implement solid waste disposal and resources recovery systems throughout Connecticut.

The Delaware County Solid Waste Authority was established in 1954. Serving a county of more than 555,000 residents in populous southeastern Pennsylvania, the Authority's IWM programs were established in reliance on flow control authority and emphasize waste reduction and recycling and the use of best available technology, including a modern WTE facility that began operation in 1992.

ecomaine is the successor by merger to Regional Waste Systems, which was established in 1974, to provide an IWM system for its twenty-one member-owner municipalities in southern Maine. Following extensive planning and public deliberation (at municipal, regional and state levels), the member municipalities voted to construct a modern WTE facility to replace reliance on landfills. Bonded indebtedness in excess of $76,000,000 was issued for the system's facilities (which includes Maine's largest recycling program) in reliance on the use of flow control authority.

The Greater Lebanon Refuse Authority (GLRA) was formed in 1959 and serves twenty-six municipalities in south-central Pennsylvania. GLRA has relied on flow control authority to provide environmentally advanced IWM services, including an aggressive recycling program (which achieved a 58% recycling rate in 2005), composting, operation of a modern landfill and a renewable energy (landfill gas) power production facility.

Marion County, Oregon utilizes IWM to serve its 300,000 citizens, which includes Salem (Oregon's capitol) and nineteen other cities. Facilities include a modern WTE facility, two transfer stations, an ash monofill, a construction and demolition debris landfill, and yard waste composting and household hazardous waste collection facilities. The County has relied on flow control authority since 1986 to facilitate implementation of this IWM system.

Metro Regional Government is an Oregon metropolitan service district that manages solid waste processing, disposal and

recycling with the aid of an enacted flow control ordinance. Other Metro responsibilities include protection of open space and parks and land use planning and transportation for the 1.3 million residents of the three counties and twenty-five cities in the greater Portland, Oregon, metropolitan area.

The Minnesota Resource Recovery Association (MRRA) is a public-private partnership for the development and operation of modern WTE facilities and other aspects of integrated waste management. MRRA represents WTE facilities serving Minnesota's Anoka, Beltrami, Benton, Carver, Clearwater, Dodge, Douglas, Goodhue, Grant, Hennepin, Mahnomen, Norman, Olmsted, Ottertail, Polk, Pope, Ramsey, Sherburne, Stearns, Stevens, Todd, Traverse, Wadena, Washington and Wilkin counties and the cities of Red Wing and Perham.

Montgomery County, Ohio provides integrated solid waste management for the approximately 500,000 residents of the greater Dayton area, including recycling, waste reduction and waste disposal services. The County's innovative waste management solutions date back to the 1960s with the construction of two waste combustion facilities that began operation in 1970. Despite long-term reliance on flow control authority, the uncertainties associated with the *C&A Carbone* decision prevented the County from proceeding with planned retrofits of its waste combustion plants.

The New York State Association of Counties (NYSAC) is a statewide association representing elected county executives, supervisors, legislators, representatives, commissioners and public administrators from New York's sixty-two counties, including the City of New York. NYSAC's activities address a number of essential governmental functions for the benefit of all county governments in New York. NYSAC is a frequent advocate in state and federal courts on important matters of public policy, such as the importance of solid waste flow control to environmentally protective solid waste management programs.

The Northwest Arkansas Regional Solid Waste Management District was established by the Arkansas General Assembly in 1991. The District provides a range of IWM services to the twenty-two municipalities in the District's six-county region. In reliance on flow control, the District incurred significant public debt to develop its waste management system, and the District's

flow control regulations were upheld in *IESI AR Corp. v. Northwest Ark. Regional Solid Waste Mgt. Dist.*, 433 F.3d 600 (8th Cir. 2006).

Outagamie County, Wisconsin, manages its IWM program to serve the best long-term interests of its thirty-two municipalities and the environment. Aggressive waste recycling-reduction-energy recovery programs address used tires, yard waste, appliances, scrap metal, construction and demolition waste, electronics and (in the near future) pharmaceuticals as well as renewable energy (landfill gas) production. These programs avoid reliance on taxes through use of an enterprise fund in conjunction with waste flow control in municipal contracts. Outagamie County recently joined two adjacent counties to collaborate on IWM services for a three-county area of over 500,000 residents.

Pine Belt Regional Solid Waste Authority is a Mississippi public benefit corporation formed in 1992 to provide IWM services for the counties of Covington, Jones, Perry and Stone, and the cities of Petal, Laurel and Hattiesburg. A challenge to Authority members' reliance on flow control was rejected in *National Solid Waste Management Assoc. v. Pine Belt Regional Solid Waste Auth.*, 389 F.3d 491 (5th Cir. 2004).

Snohomish County, Washington (population approximately 650,000) is in the central Puget Sound region approximately 30 miles north of Seattle. The County disposes of municipal solid waste generated within its borders through a competitively bid contract. The County works in cooperation with its cities and towns to provide environmentally responsible solid waste disposal, solid and household hazardous waste recycling, prevent illegal dumping, and assure cleanup and monitoring of closed landfills.

The Solid Waste Authority of Central Ohio (SWACO) serves Franklin County (Columbus) and parts of five surrounding counties, with a population of over 1.2 million. Since its inception in 1989, SWACO has been a catalyst for recycling and cutting-edge programs to find new uses for waste. Despite long-term reliance on flow control, uncertainties resulting from the *Carbone* decision prevented SWACO from upgrading its 2,000 ton-per-day WTE plant, which was instead required to shutdown. Today SWACO's comprehensive solid waste management plan addresses operation of its landfill and transfer stations and provides, without charge, a variety of recycling and waste minimization services.

Serving a population of 270,000, the Solid Waste Disposal Authority of the City of Huntsville, Alabama operates a 690 ton-per-day WTE (steam) plant, curbside recycling, landfill gas recovery, metals recovery, sewage sludge incineration, and household hazardous waste programs. In reliance on flow control, the Authority has issued $121 million in bonds, and all Authority services are financed from system fees and steam sale proceeds.

Protection of the environment was a primary consideration in the development of the Spokane Regional Solid Waste System (RSWS) by the City of Spokane and Spokane County, Washington. Reliance on flow control authority and an integrated system fee have been principal factors in implementing the Spokane RSWS, which provides solid waste reduction, recycling, recovery of energy from waste, composting and household hazardous waste collection in an environmentally safe and cost-effective manner and consistent with state requirements and objectives for solid waste management planning.

The Wasatch Integrated Waste Management District is a Utah special service district organized in 1984 to manage solid waste for Davis and Morgan counties and sixteen cities. Wasatch serves a population of more than 230,000 with a state-of-the-art WTE facility, a modern gas recovery-equipped landfill, and a variety of additional IWM services. Reliance on flow control authority has been critical for all of these programs, and a successful by-product of the Wasatch system is the sale of steam and electricity to serve adjacent Hill Air Force Base.

Established in 1971 to assure environmentally sound management for all municipal solid waste generated in York County, Pennsylvania, the York County Solid Waste and Refuse Authority serves a population of more than 400,000. The Authority's programs emphasize waste reduction and recycling and use of best available technology, which led to development of a modern WTE facility that began operation in 1989 and generates renewable energy to serve approximately 20,000 homes. To avoid reliance on taxes while securing sufficient revenue to support WTE technology's greater initial cost (as well as the cost of recycling and household hazardous waste collection services, which are provided without charge), York County adopted flow control in 1989 with the affected communities' full endorsement.

889D

No. 05-1345

IN THE

Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., *et al.*,

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF ECONOMIC DEVELOPMENT GROWTH ENTERPRISES CORPORATION, A/K/A MOHAWK VALLEY EDGE, SPOHN'S DISPOSAL SERVICE, HAWKINS & HURLBUT SANITATION, INC., STB ENTERPRISES, INC., LEFTOVER EXPRESS, INC., GRAHAM'S REFUSE SERVICE, MARSHALL PRZYLUKE, INC., R.D.'S MOUNTAIN VIEW TRUCKING, JIM BONNELL TRUCKING, INC., CONTROLLED WASTE SYSTEMS, INC., AND FRED BURROWS TRUCKING AND EXCAVATING, L.L.C. IN SUPPORT OF RESPONDENTS

GREGORY J. AMOROSO
SAUNDERS, KAHLER, AMOROSO & LOCKE, L.L.P.
185 Genesee Street, Suite 1400
Utica, New York 13501-2194
(315) 733-0419

Counsel for Amici Curiae

205228

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST OF *AMICI*	1
SUMMARY OF ARGUMENT	5
ARGUMENT	6
CONCLUSION	16

TABLE OF CITED AUTHORITIES

Page

Case:

Pike v. Bruce Church, Inc.,
397 U.S. 137 (1970) 5, 6, 14

Federal Statutes:

42 U.S.C. § 9601 *et seq.* 10, 11

State Statutes:

New York State General
Municipal Law § 901 2

New York State Not-For-Profit
Corporation Law § 1411 ..... 1, 2

Amici curiae Economic Development Growth Enterprises Corporation, also known as Mohawk Valley Edge, Spohn's Disposal Service, Hawkins & Hurlbut Sanitation, Inc., STB Enterprises, Inc., Leftover Express, Inc., Graham's Refuse Service, Marshall Przyluke, Inc., R.D.'s Mountain View Trucking, Jim Bonnell Trucking, Inc., Controlled Waste Systems, Inc., and Fred Burrow's Trucking and Excavating, L.L.C. submit this brief in support of Respondents Oneida-Herkimer Solid Waste Management Authority, County of Oneida, and County of Herkimer.[1]

STATEMENT OF INTEREST OF *AMICI*

I. Mohawk Valley Edge

The Oneida County Industrial Development Corporation was formed in 1963, pursuant to New York State Not-For-Profit Corporation Law Section 1411. As set forth in the enabling state statute, the purpose of the Oneida County Industrial Development Corporation was to foster and promote economic development and to create job growth within Oneida County, including the specific listed statutory purposes as follows:

> relieving and reducing unemployment, promoting and providing for additional and maximum employment, bettering and maintaining job opportunities, instructing or training individuals to improve or develop their capabilities for such jobs,

---

1. No portion of this brief was authored by counsel for a party, and no person or entity other than the *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. The Petitioners and the Respondents have both consented to the filing of this brief and their respective letters of consent have been filed with the Clerk of the Court.

> carrying on scientific research for the purpose of aiding a community or geographical area by attracting new industry to the community or area or by encouraging the development of, or retention of, an industry in the community or area.

New York State Not-For-Profit Corporation Law § 1411.

In 1997, the Oneida County Industrial Development Corporation amended its corporate documents to reflect a change in its name to Economic Development Growth Enterprises Corporation. The new entity also adopted the assumed name of Mohawk Valley EDGE. Mohawk Valley EDGE continued to function as the economic development agent for the County of Oneida, but expanded its efforts to include economic development in the County of Herkimer.

In 1997, Mohawk Valley EDGE also began providing staff services by contractual relationship to the other major economic development entities in Oneida County: the Oneida County Industrial Development Agency, created by the New York Legislature in 1970 by New York State General Municipal Law § 901 (to provide financing and tax incentives to industrial development), and the Griffiss Local Development Corporation, an entity created by specific act of the New York State Legislature in 1994 (to redevelop the former Griffiss Air Force Base into a business and technology park).

By staffing three distinct and separately constituted agencies with separate missions, Mohawk Valley EDGE provides a "one-stop shop" for potential developers interested in locating in the two-county area and for existing local businesses interested in growing their operations.

As part of its corporate purposes, Mohawk Valley EDGE coordinates an outreach program to existing employers within the two-county area, visiting approximately three hundred local employers annually to discuss local issues and the business climate, to help address their concerns and to assist them with opportunities for growth and new investment. On a global scale, Mohawk Valley EDGE promotes the region's business climate, quality of life, infrastructure, utilities, work force and developable sites to businesses, site selection specialists and industrial developers. Mohawk Valley EDGE develops financing and assistance packages for both new and expanding businesses and finds suitable existing buildings or "shovel-ready" sites for construction or location of a new facility.

Mohawk Valley EDGE is governed by a self perpetuating Board of Directors, representing many of the largest employers in the two county area, including manufacturers, back office businesses, banks, professional offices, private higher education institutions, service providers and retail establishments. Based on its Board membership and representation, it can safely be said that Mohawk Valley EDGE represents approximately half of the workforce in the two county region.

Mohawk Valley EDGE's interest in this appeal can be summarized as follows: 1) The benefit to local businesses and industries of a financially viable comprehensive waste management program; 2) The reduction and/or elimination of exposure of the local businesses and industries to costly environmental tort suits; and 3) The ability to attract new businesses to the area because it can guarantee proper solid waste management without unwarranted liability. These elements are critical to the creation of a business climate supporting economic development, business growth and job creation.

II. Spohn's Disposal Service, Hawkins & Hurlbut Sanitation, Inc., STB Enterprises, Inc., Leftover Express, Inc., Graham's Refuse Service, Marshall Przyluke, Inc., R.D.'s Mountain View Trucking, Jim Bonnell Trucking, Inc., Controlled Waste Systems, Inc., And Fred Burrows Trucking And Excavating, L.L.C.

Mohawk Valley EDGE is joined in this brief by the following hauling companies: Spohn's Disposal Service, Hawkins & Hurlbut Sanitation, Inc., STB Enterprises, Inc., Leftover Express, Inc., Graham's Refuse Service, Marshall Przyluke, Inc., R.D.'s Mountain View Trucking, Jim Bonnell Trucking, Inc., Controlled Waste Systems, Inc., and Fred Burrow's Trucking and Excavating, L.L.C (hereinafter collectively referred to as the "hauling companies"). The hauling companies provide solid waste collection services to the public in all of the seventy-eight cities, towns and villages compromising Herkimer County and Oneida County.

The hauling companies share in Mohawk Valley EDGE's interest in this appeal as members of the business community but also have a unique interest as integral participants in the existing comprehensive waste management system. They directly benefit from the opportunity to participate in the collection aspect of the system and from the cooperation and responsiveness of the Oneida Herkimer Solid Waste Management Authority. They also benefit from the protection provided to them from the potentially unlimited environmental liability associated with their business.

SUMMARY OF ARGUMENT

The Second Circuit Court of Appeals correctly applied the *Pike* balancing test to Oneida County Local Law No. 1 of 1990 and Herkimer County Local Law No. 1 of 1990 and found that the local benefits of the flow control laws were clear and substantial.

The business community, including the hauling companies, benefit from a financially viable comprehensive waste management plan. Such a plan provides a business-friendly atmosphere that aids in attracting new industry, in encouraging growth of new industry and in creating new jobs for the region.

The business community, including the hauling companies, also benefit from the reduction of or elimination of costly tort suits. The existing plan commits the Oneida Herkimer Solid Waste Management Authority as the responsible party, both practically and legally, to protect the users against future environmental liability.

These benefits are critical to the survival and growth of the local economy, and could not be achieved in any other way.

ARGUMENT

I. The Second Circuit Was Correct In Finding That The Local Benefits To The Local Laws Are "Clear And Substantial"

The Second Circuit Court of Appeals considered the validity of Oneida County Local Law No. 1 of 1990 and Herkimer County Local Law No. 1 of 1990 under the *Pike* balancing test. Pet. App. at 29a. Said test, as set forth in the 1970 opinion, requires the following analysis:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive to the putative local benefits . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

In applying the *Pike* test, the Second Circuit found that "(t)he ordinances' benefits . . . are clear and substantial." Pet. App. at 29a. The Court elaborated as follows:

> Our conclusion that the assumed burden created by the challenged ordinances is slight means that the defendants need to present only a minimal

> showing of local benefits in order to compel a finding that the burden is not 'clearly excessive' to the benefits that the ordinance provides. The Counties' flow control regulations easily clear this hurdle.

Pet. App. at 29a.

A. The Business Community And Hauling Companies Benefit From A Financially Viable Comprehensive Waste Management Program.

There are three basic "public utility" functions that are essential to economic growth and business development within a region: 1) a system for providing a clean supply of water; 2) a system for properly treating and disposing of wastewater discharge; and 3) a system for properly managing and disposing of solid waste. Pet. App. at 472a. In simplest terms, these services are regularly described as "water", "sewer" and "garbage", and businesses traditionally look to their local governments to adopt and implement comprehensive plans for these necessary services.

Each service is seen as equally important for a successful business climate. As stated in the affidavit of now retired Oneida County Planning Director Michael Gapin:

> A public solid waste management system is just as important as a region's water and wastewater systems. If there cannot be public oversight and control of the solid waste collection system, it is akin to having a public water supply reservoir or a wastewater treatment plant without the pipes.

Pet. App. at 488a, 489a.

The importance of a comprehensive solid waste management plan was recognized by the District Court. Judge Mordue specifically held that it was obvious that the waste management scheme adopted by the two Counties had or would improve the local economy in attracting new businesses and creating new jobs. Pet. App. at 21a. Judge Peebles held that the two Counties' waste management plan meets a "legitimate desire to provide a business-friendly atmosphere designed to attract industry and provide jobs in the community". Pet. App. at 19a.

Through their elected officials, the counties of Oneida and Herkimer adopted a comprehensive plan designed to match the best management method to each component of solid waste. Pet. App. at 461a. The plan contains a strong recycling component, but also emphasizes the benefit of this component to businesses. As of November of 2006, local businesses have been able to obtain over four hundred free waste "audits" performed by the Oneida Herkimer Solid Waste Management Authority, to improve their recycling and thereby reduce their waste disposal expenses. These waste "audits" also provide an opportunity for the identification of hazardous wastes and the development of the most appropriate and cost-effective disposal methods. Pet. App. at 425a, 382a.

The most fundamental concern of businesses and industries in regards to utilities, both public and private, always relates to cost. Removal of solid waste is part of the overhead of any business, and stability in overhead costs is critical to both short-term and long-term budgeting. The solid waste plan adopted by the two counties provides much-needed stability in the economically tumultuous area of solid waste disposal. The plan allows for the distribution of costs

commensurate with the disposal demands of each user. This in turn allows businesses to accurately project and budget for the costs related to their present and future solid waste removal needs.

The hauling companies also directly benefit from the existence of a comprehensive plan. They are given the opportunity to provide collections services to the public over the two thousand three hundred square mile area that comprises the two counties. The Oneida Herkimer Solid Waste Management Authority has been and continues to be responsive to their needs, offering conveniently located transfer stations with expanded hours and days of operation and with equipment designed to significantly reduce waiting times. They are able to dispose of all types of waste collected from the public, including recyclables and green waste. All of the haulers, both large and small, are treated equally and fairly as to disposal costs, regardless of volume of waste delivered to the transfer stations. The hauling companies clearly share in the benefits related to consistent, predictable costs and a stable system.

The agreement of the hauling companies to participate as amici curiae in this Brief is quite remarkable, and indicates that they do not feel "left behind" or aggrieved by the current comprehensive system. Instead, they feel that their partnership with the Oneida Herkimer Solid Waste Management Authority provides them with financial constancy and reliability.

B. The Business Community And The Hauling Companies Benefit From The Reduction Or Elimination of Costly Environmental Tort Suits.

Any business contemplating a relocation or expansion of its operations immediately considers the issue of potential environmental liability at its new or expanded facility. The reduction or, if possible, elimination of environmental liability is one of the most significant factors in site selection.

Businesses within Oneida and Herkimer Counties are uniquely aware of the environmental liabilities that can result from the remediation of a landfill. In recent history, many local businesses have experienced the traumatic effects of cost recovery actions based on CERCLA. *See* 42 U.S.C. § 9601 *et seq.*

During the cost recovery efforts associated with the remediation of the former Ludlow Landfill, six hundred and three local businesses, individuals, haulers, school districts and other entities were sued and forced to incur legal fees and settlement costs. Pet. App. at 416a, 450a, 452a. The record is replete with references to this litigation and its disastrous effect on the local business community.

In 1996, over one hundred local businesses and haulers were subject to yet another intense investigation as potential responsible parties, as a result of the discovery of hazardous waste in the City of Rome, New York's former municipal landfill. After a six year investigation, during which many of the businesses hired counsel and incurred substantial legal expenses, six businesses were ultimately named in a state Superfund recovery action. The investigation and litigation occurred even though the City had closed the landfill almost

a decade earlier in accordance with the standards set by the New York State Department of Environmental Conservation. The businesses had to pay legal fees for defense and the six named businesses had to pay settlement costs, due to lack of oversight at the facility and the improper disposal practices of a limited number of bad actors.

These cost recovery suits under the "Superfund" laws are based on the statutory scheme's imposition of "strict, joint and several liability" for any users who sent its solid waste to the particular landfill. The liability will attach whether or not the user knew of the waste disposal practices at the landfill. The liability will attach whether or not the user knew about other users of the landfill and their waste disposal practices. The liability will attach whether or not the user even knew which particular landfill was actually receiving its solid waste from its hauler. The liability will attach even if the past waste disposal practices were permitted at the time they took place. The message of the statutory scheme is clear to the business community: if your business is named in a Superfund cost recovery action, the liability will attach. *See* 42 U.S.C. § 9601 *et seq.*

Once a business is investigated and/or brought into one of these suits, either as a defendant or as a third party defendant, it will incur legal and other professional fees for investigation, litigation and negotiation. It will also most likely have to pay some sort of settlement in order to be released from the suit. The settlement is often greater than the business' fair share of the clean-up costs, because the cost of litigating the issue of each parties' exact share of the culpability is cost prohibitive. Pet. App at 477a, 478a.

The business communities of both Oneida and Herkimer County have not forgotten the lessons learned during the Ludlow landfill and the Rome City landfill remediation and cost recovery efforts. As stated by Hans Arnold, Executive Director of Respondent Oneida Herkimer Solid Waste Management Authority, in his 1995 affidavit, in regard to the Ludlow matter:

> Citizens were sent a bill to clean up a problem they thought they had left at the curb years ago. They never expected it to return.

Pet. App. at 416a

This sentiment is echoed in the newspaper quote set forth in the affidavit of Robert Julian:

> Everybody in the County is going to be responsible up to 20 years for whatever they threw out, ***and for whatever their garbage man might have done with it*** —Edward A. Zammiello, Jr., Co-Owner Frank's Body Works.

(Emphasis added). Pet. App. at 452a.

Mr. Zammiello's quote emphasizes the need of the business community for a solid waste management plan that provides protection from environmental liability. The evidence establishes that the comprehensive plan adopted by Oneida and Herkimer Counties provides that protection.

Hans Arnold provided a statement about the protection systems used by the Authority once it is in possession and control of the solid waste. Before disposal, the Authority

monitors and inspects the waste to insure that it has not received any dangerous or hazardous materials. The Authority used extreme care in ensuring that the waste was only sent for disposal to facilities with the best environmental protective systems and proven management experience. Pet. App. at 426a, 427a, 428a.

The benefit of this process to the users and the hauling companies is immeasurable. As stated in the expert opinion of Dr. Robert N. Stavins, private waste haulers would not likely have the resources to expend similar efforts to evaluate the environmental consequences of their choices. Further, it would not be financially feasible or practical for each user to gather this type of information.

> While this information may be costly to gather, once gathered, its benefits can be shared with all waste generators without cost. Therefore, while for each generator the benefits of gathering this information may not outweigh the costs of doing so, the benefits enjoyed by all the Counties' waste generators may far outweigh the cost to the Authority of collecting and sharing the information. Put simply in terms of conventional economics, public good tends to be under-provided by ordinary private means.

Pet. App. at 385a.

The most important benefit to the business community, including the hauling companies is the theory of collective responsibility for potential future environmental liability. Pet. App. at 427a. As stated by Hans Arnold, the Oneida Herkimer Solid Waste Management Authority has "made a commitment as the responsible party should there be any legal action in the future." Pet. App. at 428a.

When marketing the region to outside businesses looking to relocate, and when advising and assisting existing businesses to expand, Mohawk Valley EDGE can definitely answer their important question about environmental tort liability. The comprehensive solid waste management plan, which includes Oneida County Local Law No. 1 of 1990 and Herkimer County Local Law No. 1 of 1990, provides a responsible party, both from a legal sense and from a practical sense, to protect against future liability.

II. The Second Circuit Was Correct In Finding That The Local Benefits Could Not Be Achieved "In Any Other Way"

The *Pike* balancing test requires an analysis as to whether the local benefits "could be promoted by a lesser impact on interstate activities." *Pike v. Bruce Church, Inc.* 397 U.S. 137, 142 (1970). It is respectfully submitted that the local benefits set forth above could not be achieved by any other method.

It is only through flow control that the local government is able to ensure that its waste management standards are met and thereby effectively provide tort liability protection to its citizens, including its businesses and haulers. As stated by Dr. Stavins:

> (F)low control significantly increases the ability of the authority to enforce the law . . . Were haulers able to bring their waste to any disposal site, an equal level of enforcement would be much more costly — if not impossible — to achieve.

Pet. App. at 389a.

Petitioners' answer to the environmental liability issue is to suggest that the Counties would be wise to avoid the issue altogether. In their brief, Petitioners state as follows:

> This putative justification for flow control is misguided. If a commercial hauler were to pick up waste from a business or residence and then bring it to a processing or disposal facility unconnected with the Counties, respondents never would come into possession of the waste and would not have any liability for it . . . Indeed, if respondents genuinely wanted to minimize exposure to environmental liability, it would be rational for them to ***encourage*** the use of private waste disposal alternatives.

See Petitioners' Brief, p. 19.

The line of reasoning is echoed in the Brief of Amici Curiae National Solid Wastes Management Association, American Trucking Associations, Inc. and National Association of Manufacturers, when they state as follows:

> A local government would not have any Superfund or other liability for waste collected by private haulers disposed of at a private landfill.

See Brief of Amici Curiae National Solid Wastes Management Association, American Trucking Association, Inc., and National Association of Manufacturers, pp. 23-24.

This argument by Petitioners and their Amici is a slap in the face to the businesses that provide jobs for the citizens of the Counties and that pay taxes to support the governments of the Counties. Petitioners are urging the Counties to hide their heads, protect themselves and leave all potential environmental liabilities on the doorsteps of their businesses, haulers and residents. It is also insulting to the elected officials of County government. Petitioners assume that the officials only worry about the liability of County government itself, not the liability faced by the citizens and businesses of the region.

There is simply no evidence of any other alternative system that will provide the businesses, industries and haulers with a financially viable comprehensive waste management program combined with the reduction of or elimination of costly environmental suits.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

GREGORY J. AMOROSO
SAUNDERS, KAHLER, AMOROSO
& LOCKE, L.L.P.
185 Genesee Street, Suite 1400
Utica, New York 13501-2194
(315) 733-0419

Counsel for Amici Curiae

886A

(16)

No. 05-1345

FILED
DEC 7 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., *et al.*,

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE ENVIRONMENTAL DEFENSE IN SUPPORT OF RESPONDENTS

MICHAEL J. BEAN
Counsel of Record
JAMES T.B. TRIPP
ISABELLE SILVERMAN
J. CULLEN HOWE
Environmental Defense
257 Park Avenue South
New York, New York 10010
(212) 505-2100

Counsel for Amicus Curiae

205266

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THE PROBLEM OF WASTE DISPOSAL IN THE UNITED STATES	5
II. THE COMPONENTS OF THE COUNTIES' FLOW CONTROL REGULATIONS	7
III. THE RESPONDENTS' FLOW CONTROL REGULATIONS PROVIDE A WIDE ARRAY OF IMPORTANT HEALTH AND ENVIRONMENTAL BENEFITS TO THE RESIDENTS OF ONEIDA AND HERKIMER COUNTIES	10
A. The Counties' Flow Control Regulations Provide Important Environmental and Health Benefits to the Residents of Oneida and Herkimer Counties.	10
B. The Respondents' Flow Control Ordinances Benefit the Counties' Residents By Reducing Their Exposure to Diesel Emissions.	12
CONCLUSION	17

TABLE OF CITED AUTHORITIES

Page

CASES

Pike v. Bruce Church, 397 U.S. 137 (1970) 3

United Hauler Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority, 438 F.3d 150 (2nd Cir. 2006) 2

STATUTES

42 U.S.C. § 6901(a)(4) (2000) 9

42 U.S.C. § 6943(b) 9

OTHER AUTHORITIES

Clean Air Task Force, *Diesel Soot Health Impacts: Oneida County, New York, available at* http://www.catf.us/projects/diesel /dieselhealth/ county.php?c=36065&site=0 13-14

Comm. on Envir. Health, Am. Acad. of Pediatrics, *Ambient Air Pollution: Health Hazards to Children*, 14 Pediatrics 1699, 1702-1707 (2004), *available at* http://pediatrics.aappublications.org/ cgi/content/full/114/6/1699#R5. 13

Energy Info. Admin., U.S. Dep't of Energy, Publ'n No. DOE/EIA-0573, *Emissions of Greenhouse Gases in the United States 2005* (2005), *available at* http://www.eia.doe.gov/oiaf/1605/ggrpt/ index.html. 15

Cited Authorities

Page

Envt'l Prot. Agency, *About EPA: Regions*, http://www.epa.gov/epahome/locate2.htm (last visited Dec. 5, 2006) 16

Envt'l Prot. Agency, *Clean Diesel Campaign*, http://www.epa.gov/diesel 14

National Ambient Air Quality Standards for Particulate Matter; Proposed Rule, 71 Fed. Reg. 2620, 2627 (January 17, 2006) 15

National Ambient Air Quality Standards for Particulate Matter; Final Rule, 71 Fed. Reg. 61144, 61151 (October 17, 2006) 15

N.Y. Envtl. Conserv. Law § 27-0106(1) (McKinney 2006) 9

N.Y. State Dep't of Health, *EPSD/CTHP Provider Manual for Child Health Plus* 81 (2005), *available at* http://www.emedny.org/ProviderManuals/EPSDTCTHP/PDFS/EPSDT-CTHP.pdf 15-16

Office of Air Quality and Prot. Standards, Envt'l Prot. Agency, *8-Hour Ground-level Ozone Designations: Region 2: State Designations* (2004), http://www.epa.gov/ozonedesignations/regions/region2desig.htm (last visited Dec. 5, 2006) 17

Cited Authorities

Page

Office of Air Quality and Prot. Standards, Envt'l Prot. Agency, *8-Hour Ground-level Ozone Designations: Region 3: State Designations* (2004), http://www.epa.gov/ozonedesignations/regions/region3desig.htm (last visited Dec. 5, 2006) 16-17

Office of Air Quality and Prot. Standards, Envt'l Prot. Agency, *Fine Particle (PM 2.5) Designations: Region 2: State Designations* (2004), http://epa.gov/pmdesignations/regions/region2desig.htm (last visited Dec. 5, 2006) 16

Office of Air Quality and Prot. Standards, Envt'l Prot. Agency, *Fine Particle (PM 2.5) Designations: Region 3: State Designations* (2004), http://epa.gov/pmdesignations/regions/region3desig.htm (last visited Dec. 5, 2006) 16

Office of Research and Dev., U.S. Envtl. Prot. Agency, Publ'n No. EPA/600/8-90/057F, *Health Assessment for Diesel Engine Exhaust*, p. 1-1 (2002), *available at* http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=29060. ..... 13, 14

Office of Solid Waste, U.S. Envtl. Prot. Agency, *Municipal Solid Waste in the United States: 2005 Facts and Figures* 1-2 (2006), *available at* http://www.epa.gov/epaoswer/non-hw/muncpl/msw99.htm 5

Cited Authorities

Page

U.S. Dep't of State, *U.S. Climate Action Report 2002*, 27-30, Fig. 3-1, Table 3-1 (2002), *available at* http://www.gcrio.org/CAR2002/car2002ch3.pdf 15

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Environmental Defense is a leading national nonprofit organization representing more than 500,000 members nationwide. Since its founding in 1967, Environmental Defense has linked science, economics and law to create innovative, equitable and cost-effective solutions to society's most urgent environmental problems. Environmental Defense is dedicated to assuring that all people, including future generations, enjoy clean air, clean water, healthy food and flourishing ecosystems. Environmental Defense is guided by scientific evaluation of environmental problems, and the solutions it advocates are based on science.

Pursuant to its mission, Environmental Defense is interested in municipal waste management plans that emphasize recycling and waste reduction and promote transport of waste and recyclables by water or rail, rather than by truck, in urban areas where these options are available in order to reduce urban traffic congestion, minimize negative air quality impacts, and otherwise serve human health and environmental purposes. Because government entities are able to take environmental considerations into account in devising their solid waste management strategies, they are often in the best position to design and implement environmentally responsible solid waste management systems. Environmental Defense supports the waste

---

[1] Pursuant to this Court's Rule 37.6, no portion of this brief was authored by counsel for a party, and no person or entity other than the *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. The Petitioners and the Respondents have both consented to the filing of this brief and their respective letters of consent have been filed with the Clerk of the Court.

management plan at issue here because it provides many tangible environmental and air quality benefits to the residents in Oneida and Herkimer Counties (the "Counties"). Most importantly, the flow control regulations are essential to the Counties' successful implementation of their waste management plan. Many other municipalities, such as New York City, could reduce the environmental burdens of their waste system if they could exercise increased control over the flow of commercial sector waste.

SUMMARY OF ARGUMENT

The United States produces almost 250 million tons of trash per year, the vast majority of which is put into landfills. Many communities, particularly urban ones such as New York City, have reached the point where they have to transport their waste hundreds of miles so it can be put into landfills with available capacity. While this has resulted in a thriving waste transport business, it has led to a dependency on truck-based means of transporting this waste, with little municipal control over the emissions from private sector trucks, most of which pre-date any effective federal regulations, exacerbating traffic congestion and air pollution. Municipalities like New York City have an interest in fostering a solid waste system that minimizes air pollution and traffic congestion. Flow control is one of the most effective ways of accomplishing these goals.

The purpose of this brief is not to add to the legal arguments of respondents and other amicus parties that support the position of the respondents that the Second Circuit in *United Hauler Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 438 F.3d 150 (2nd Cir. 2006) ("United Haulers II") correctly applied the

balancing test that this Court enunciated in *Pike v. Bruce* Church, 397 U.S. 137 (1970) in analyzing the respondents' flow control regulations. Under this test, courts will uphold a challenged regulation unless it places a burden on interstate commerce that is clearly excessive when compared to the putative local benefits. While, in our view, the Second Circuit's analysis is sound, and the challenged regulations do not treat similarly situated in-state and out-of-state business interests differently, the purpose of this brief is to highlight the very significant environmental and environmental justice benefits that can be derived through properly designed municipal flow control programs.

The Second Circuit held that such local benefits included a waste management system that encourages waste volume reduction, recycling and reuse and ensures the proper disposal of hazardous waste. Environmental Defense submits this amicus brief in support of respondents because, whether the Court applies the *Pike* balancing test or any more stringent standard to the challenged regulations, it is vitally important that it consider the full measure of environmental benefits that they provide to the Counties' residents, and the benefits that similarly enacted flow control regulations can provide to residents in other communities.

The flow control provisions at issue here are an integral part of the waste management plan implemented by Oneida-Herkimer Solid Waste Management Authority (the "Authority"). They provide for maximum levels of waste reduction and recycling. To this end, the regulations require that waste generators separate their recyclable material and make it available for delivery to the Authority. Non-recyclable waste is brought to the Authority's transfer station. It is first inspected to ensure that it does not contain any hazardous

waste and it is then transported to its ultimate disposal site by a contractor chosen by the Authority. These regulations are consistent with both federal and state policy concerning waste disposal.

By encompassing these state and federal policies, the regulations provide numerous benefits to the Counties' residents, including minimizing the amount of waste that is hauled by trucks, thereby reducing the amount of diesel fuel that the Counties' residents are exposed to; providing reliable waste management service while protecting the public health, safety and welfare; replacing high volume, undifferentiated waste disposal methods with a system that matches the best management method to each component of solid waste; making waste reduction and recycling legally mandated top priorities for solid waste management; establishing and expanding markets for recyclables; and conserving vital natural resources.

The regulations provide many environmental, economic and social benefits. Since 1989, the Counties' recycling rate has increased fourfold. Over the last seventeen years over, 700,000 tons of materials have been recycled. Approximately 50% of all solid waste collected by the Authority is recycled instead of being landfilled. Of this amount, over 370,000 tons of recyclable material have been processed and sold, generating millions of dollars for the Authority's solid waste management system. It has also ensured the proper and safe disposal of hazardous waste. Finally, because a portion of this recycled material is sold, the regulations have realized the additional benefit of reducing the extraction of natural resources.

The respondents' flow control regulations also provide significant air quality and health benefits for the Counties' residents because they minimize the number of trucks used to transport waste, and reduce the number of miles traveled by each truck, because solid waste is disposed of locally. Most garbage trucks run on diesel fuel, and it is well documented that diesel emissions are harmful to human health and contribute substantially to local air pollution. Diesel exhaust is a major contributor of the cancer risk from air toxins in the United States. Exposure to diesel exhaust can also contribute to short and long-term health hazards, such as asthma, cardiovascular and respiratory problems, strokes, heart attacks, lower birth weight and even premature death.

ARGUMENT

I. THE PROBLEM OF WASTE DISPOSAL IN THE UNITED STATES

According to the United States Environmental Protection Agency, from 1960 to 2005, the total amount of municipal solid waste generated annually in the United States increased from 88 million tons to 245.7 million tons, slightly less than one ton of trash for each American. *See* Office of Solid Waste, U.S. Envtl. Prot. Agency, *Municipal Solid Waste in the United States: 2005 Facts and Figures* 1-2 (2006), *available at http://www.epa.gov/epaoswer/non-hw/muncpl/msw99.htm.* This averages to approximately 4 ½ pounds of trash per person per day. Although some of this waste is recycled, the vast majority of it is put into landfills. While the per capita generation rate of municipal solid waste is slowly leveling off, the total amount of solid waste that must be disposed of each year continues to increase. *See id.* Unless innovative

approaches such as the Authority's are adopted, continual construction and expansion of landfill capacity will be needed, which in turn steadily increases the consumption of land for disposal.

Many communities, particularly high density urban areas such as New York City, have reached the point where they do not have the facilities to dispose of their solid waste locally and must therefore transport the vast majority of it hundreds of miles so it can be put in landfills with available capacity. While this has resulted in a thriving waste transport business, it has led to most commercial waste in New York City being transported by private charter collection trucks to land-based transfer facilities concentrated in low-income communities and then exported to out-of-state facilities via private firm, long-haul trucks. Since most of these privately operated trucks have been in use for years and will be in use for many more years, their diesel emissions are not effectively regulated. This truck dependency exacerbates road congestion and air pollution. It also negatively impacts the health of residents in communities where these facilities are located. In New York City hundreds of garbage trucks are clogging already congested streets. It is not uncommon to see garbage trucks from several different commercial waste haulers service businesses on the same street. Municipalities such as New York City have an interest in fostering a solid waste system that minimizes air pollution and traffic congestion by, among other things, encouraging marine or rail transport as a way of reducing waste truck vehicular miles traveled. Flow control is one of the most effective ways of accomplishing these environmental and social goals.

Because environmental concerns are an inherent part of waste creation and disposal, it is appropriate for municipal

governments to assert control over waste created in their community, and flow control is an essential tool in ensuring that this waste is disposed of in an environmentally responsible manner.

II. THE COMPONENTS OF THE COUNTIES' FLOW CONTROL REGULATIONS

The flow control provisions at issue here were included in Oneida County Local Law #1 of 1990 and Herkimer County Local Law #1 of 1990 (the "Regulations"). Pet. App. 118a-130a (Oneida County Ordinance), 131a-143a (Herkimer County Ordinance). They are an integral part of the comprehensive waste management plan implemented by the Authority, a public benefit corporation created in the late 1980's. In general, the Regulations establish fundamental responsibilities for each citizen, waste generator, municipality and hauler. To this end, they "provide for maximum levels of waste reduction and recycling, coupled with the development of environmentally and economically sound programs and facilities for the remainder of the waste stream." JA144a.

A primary component of the Regulations is recycling and waste reduction. The Regulations require both waste source separation by waste generators and delivery of these segregated materials to various county-designated public facilities by all public and private waste haulers. By charging for the disposal of solid waste, while accepting recyclables at no cost, the Regulations concomitantly encourage waste reduction and recycling. They also provide funding for a wide range of waste reduction, recycling facilities and programs.

The Regulations require that every waste generator (citizens, businesses, etc.) provide for the proper disposal of all waste that they generate by requiring them to separate recyclable from non-recyclable waste before collection by waste haulers. Although waste generators may have recyclables sent directly to a buyer outside of the Authority's system, if they do not make such an arrangement, they must place recyclables at the curbside for delivery to the Authority. JA 358a.

The Regulations further mandate that private haulers deliver all acceptable non-recyclable materials and all curbside recyclables generated within the Counties to the Authority's recycling facility. Once the recyclables are delivered to the facility, they are processed and ultimately sold to buyers all over the world. The Authority recycles 33 types of waste products, many of which are not commonly recycled by other public or private waste management programs. JA 378a-79a.

Nonrecyclable waste is brought to the Authority's transfer stations. The waste is inspected to ensure that it does not contain any dangerous or hazardous materials and to ensure that haulers and generators comply with the Regulations' recycling requirements. Following the inspection, the waste is consolidated to facilitate transportation to its ultimate disposal site by a contractor chosen by the Authority through an open, competitive bidding process. To ensure that this waste is disposed of in an environmentally responsible manner, the Authority has, in the past, selected a contractor that demonstrates "the requisite experience and skill in the necessary technologies, and propos[es] a plan that provides the most cost-effective

method of disposing of solid waste with maximum protection of human health and the environment."[2] JA 359a.

The Regulations are consistent with both federal and state policy concerning solid waste disposal. The Resource Conservation and Recovery Act ("RCRA"), states that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies." 42 U.S.C. § 6901(a)(4) (2000). Although RCRA establishes national solid waste goals and standards, it places primary responsibility on the States to develop solid waste management plans that promote recycling, energy recovery, resource conservation, and environmentally sound disposal methods. 42 U.S.C. § 6943(b). Consistent with RCRA's mandate, New York State has established four statewide management priorities with regard to solid waste: (1) reduce the amount of solid waste generated; (2) reuse material for the purpose for which it was originally intended or recycle material that cannot be reused; (3) recover, in an environmentally acceptable manner, energy from solid waste that cannot be economically and technically reused and recycled; and (4) dispose of solid waste that is not being reused, recycled or from which energy is not being recovered, by land burial or other methods approved by the department. N.Y. Envtl. Conserv. Law § 27-0106(1) (McKinney 2006). The Regulations are consistent with these federal and state policies.

---

[2] As of October 24, 2006, the Authority's solid waste landfill, located in Oneida County, was completed and began receiving waste. Starting January 1, 2007, all non-hazardous, non-recyclable waste from the Counties will be landfilled there. Resp. Br. at 1.

III. THE RESPONDENTS' FLOW CONTROL REGULATIONS PROVIDE A WIDE ARRAY OF IMPORTANT HEALTH AND ENVIRONMENTAL BENEFITS TO THE RESIDENTS OF ONEIDA AND HERKIMER COUNTIES.

The flow control Regulations provide numerous environmental benefits to the residents of Oneida and Herkimer Counties. Such benefits include minimizing the amount of waste that is hauled by trucks, thereby reducing the amount of diesel fuel that the Counties' residents are exposed to; providing reliable waste management service while protecting the public health, safety and welfare; replacing high volume, undifferentiated waste disposal methods with a system that matches the best management method to each component of solid waste; making waste reduction and recycling legally mandated priorities for solid waste management; establishing and expanding markets for recyclables; and conserving vital natural resources.

A. The Counties' Flow Control Regulations Provide Important Environmental and Health Benefits to the Residents of Oneida and Herkimer Counties.

In addition to reduced exposure to diesel emissions, the respondents' flow control regulations have resulted in other important environmental, economic and social benefits to the residents of Oneida and Herkimer Counties.

First and foremost, the Regulations benefit the Counties' residents by creating a comprehensive waste management system that matches the best management method to each component of solid waste while making waste reduction and recycling legally mandated priorities.

Together, the Counties produce approximately 300,000 tons of waste each year. Since 1988, when the Authority was created, it has reliably and safely disposed of over 2.3 million tons of solid waste generated in the Counties. Since the opening of the Authority's recycling facility in 1991, it has removed over 700,000 tons of material from the waste stream through recycling, or approximately one-third of the total amount of solid waste generated. Of this amount, over 370,000 tons of recyclable material has been processed and sold, yielding more than $13 million in revenue, and conserving approximately two years of landfill capacity. The avoided cost of landfilling this recyclable material at $55/ton is over $20 million. Since 1992, the Authority has received and composted over 180,000 tons of yard debris, and made over 50,000 cubic yards of compost and mulch available to the Counties' residents. The avoided cost of landfilling this material, at $55/ton, is over $7.5 million. JA 359a.

Moreover, because the Counties charge "tipping fees" for the collection and disposal of nonrecyclable waste but do not charge such a fee for recyclables, the Regulations provide a strong economic incentive for waste creators to comply with the recycling mandate. These economic incentives encourage residents, businesses and haulers to find innovative ways to reduce the amount of waste they generate. For example, higher tipping fees have provided an incentive for large waste generators in the Counties, such as hotels and industrial facilities, to seek out waste reduction and recycling opportunities. The Authority has assisted such efforts. JA 381a-82a.

The Authority's recycling facility also provides the benefit of ensuring the proper and safe disposal of hazardous

waste. Since 1993, the facility has received and safely disposed of or recycled over 260,000 gallons of liquid hazardous waste, including paint, pesticides, pool and photographic chemicals, oil, antifreeze, and batteries. JA 359a-60a. By properly screening all waste that comes into the facility, the Authority ensures that all liquid and hazardous waste is disposed of in a manner that provides maximum protection of human health and the environment. The benefits of proper disposal of such waste are obvious. The safe disposal of hazardous waste was the impetus behind the creation of the Authority in the 1980's, when state health officials closed drinking water wells near several dump sites in the Counties, twelve of which were ultimately identified as hazardous waste disposal sites by state and federal authorities, and one of which was named to the National Priorities List (Superfund). Resp. Br. at 3-4.

Finally, the Regulations have realized an additional benefit, the reduced extraction of natural resources. Most of the recyclables are sold to companies that use the recyclable materials as feedstock to manufacture new products, thereby replacing the use of virgin materials in the manufacturing process.

B. The Respondents' Flow Control Ordinances Benefit the Counties' Residents By Reducing Their Exposure to Diesel Emissions.

The respondents' flow control measures also provide important air quality and health benefits for the Counties' residents because the regulations' recycling requirements reduce the amount of waste that is ultimately landfilled. Flow control has further allowed the Counties to site their landfill within their borders. Thus, the Regulations have the effect

of both minimizing the number of trucks used to transport waste and reducing the number of miles traveled by each truck, thereby reducing the Counties' residents' exposure to harmful diesel emissions.

Most garbage truck engines run on diesel fuel. Often, diesel garbage trucks, which can stay in use for decades, have very old, highly polluting engines. It is well documented that diesel emissions are harmful to human health and contribute substantially to local air pollution. Several organizations, including the Environmental Protection Agency (EPA), have designated diesel exhaust as a probable or potential human carcinogen. Diesel exhaust is a major contributor of the cancer risk from air toxins in the United States. Office of Research and Dev., U.S. Envtl. Prot. Agency, Publ'n No. EPA/600/8-90/057F, *Health Assessment for Diesel Engine Exhaust*, p. 1-1 (2002), *available at http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=29060*. Studies show that concentrations of toxic pollutants, such as diesel emissions, in neighborhoods near heavily traveled highways, are significantly higher than normal, producing a cancer risk as high as 1 in 130 in some areas. Comm. on Envir. Health, Am. Acad. of Pediatrics, *Ambient Air Pollution: Health Hazards to Children*, 14 Pediatrics 1699, 1702-1707 (2004), *available at* http://pediatrics.aappublications.org/cgi/content/full/114/6/1699#R5.

For residents of Oneida County, the lifetime cancer risk from diesel soot exceeds the combined risk of all other air toxics tracked by the EPA. For these residents, the average lifetime diesel soot cancer risk is 155 times greater than EPA's acceptable cancer level of 1 in a million. Compared to other counties nationwide, Oneida County's citizens have a considerably above-average cancer risk. Clean Air Task

Force, *Diesel Soot Health Impacts: Oneida County, New York, available at http://www.catf.us/projects/diesel / dieselhealth/county.php?c=36065&site=0* (using the approved health impact modeling methodology of the EPA). For residents of Herkimer County, the average lifetime diesel soot cancer risk is 130 times greater than the EPA's acceptable cancer level. *Id.* Notably, Oneida and Herkimer Counties comply with the federal health-based ozone and $PM_{2.5}$ standard. In counties that are in non-attainment for those pollutants, the average diesel soot cancer risk is even higher. Those counties, especially, should not be further burdened with unnecessary long-haul diesel trucks.

Besides cancer, exposure to diesel emissions significantly contributes to short and long-term health hazards, such as asthma, cardiovascular and respiratory problems, strokes, heart attacks, lower birth weight and even premature death. Office of Research and Dev., U.S. Envtl. Prot. Agency, Publ'n No. EPA/600/8-90/057F, *Health Assessment for Diesel Engine Exhaust*, p. 1-1 (2002), *available at* http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=29060. Nationwide, EPA has estimated that diesel pollution is the leading cause of thousands of instances of premature mortality, hundreds of thousands of asthma attacks, millions of lost work days, and numerous other health impacts. Envt'l Prot. Agency, *Clean Diesel Campaign*, http://www.epa.gov/diesel (last visited Dec. 2, 2006). Many epidemiological studies have documented the serious health threats associated with exposure to fine particulate matter ($PM_{2.5}$) – otherwise known as black soot. With respect to $PM_{2.5}$, EPA has determined that "[t]he range of health outcomes linked with fine particle exposures is also broad, including effects on the cardiovascular and respiratory systems, and potential links

with developmental effects in children (*e.g.*, low birth weight) and death from lung cancer." *National Ambient Air Quality Standards for Particulate Matter; Proposed Rule, 71 Fed. Reg. 2620, 2627 (January 17, 2006). See also National Ambient Air Quality Standards for Particulate Matter; Final Rule,* 71 Fed. Reg. 61144, 61151 (October 17, 2006). In addition, diesel engines emit nearly 40 toxic substances, including carbon monoxide, smog-forming nitrogen oxides and hydrocarbons.[3]

As mentioned above, diesel pollution is a known trigger for asthma attacks. The New York State Department of Health has found that asthma is a serious public health problem in New York State and the nation. Children are especially at risk because they breathe at a faster rate – in New York State over 250,000 children suffer from asthma. Asthma caused an average of 358 deaths per year in New York during the period 1998-2000, including 12 deaths per year in children under 14 years of age. In addition, New York residents had an average of 42,725 asthma hospitalizations per year during the period 1998-2000. Total Medicaid health care expenditures for recipients with asthma in New York State exceeded $1 billion in fiscal year 2000. N.Y. State Dep't of Health, *EPSD/CTHP Provider Manual for Child Health*

---

[3] Diesel fuel emissions also produce approximately 22% of the 1,958 million metric tons of carbon dioxide (CO_2) released by the transportation sector. Energy Info. Admin., U.S. Dep't of Energy, Publ'n No. DOE/EIA-0573, *Emissions of Greenhouse Gases in the United States 2005* (2005), *available at* http://www.eia.doe.gov/oiaf/1605/ggrpt/index.html. Such CO_2 emissions, in turn, constitute the dominant man-made greenhouse gas associated with climate change. U.S. Dep't of State, *U.S. Climate Action Report 2002*, 27-30, Fig. 3-1, Table 3-1 (2002), *available at* http://www.gcrio.org/CAR2002/car2002ch3.pdf.

Plus 81 (2005), *available at* http://www.emedny.org/ProviderManuals/EPSDTCTHP/PDFS/EPSDT-CTHP.pdf.

The Counties' flow control measures also provide important air quality benefits to people living and working in counties where diesel long-haul trucks, carrying solid waste from the Counties, pass through on their long journey to out-of-county landfills such as landfills in Virginia or Pennsylvania. Long-haul diesel trucks on their way to landfills in Pennsylvania or Virginia could travel through counties in New York, New Jersey, Delaware, Maryland, the District of Columbia and Pennsylvania. This region is already struggling with bad air quality and many counties of those states are in non-attainment with federal health-based air quality standards for fine particle matter ($PM_{2.5}$) and ground-level ozone standards. EPA Regions 2[4] and 3[5] have a total of 158 counties containing millions of people that are in non-attainment with the federal health-based ozone standard and 80 counties that are in non-attainment with the federal health-based fine particle ($PM_{2.5}$) standard. Office of Air Quality and Prot. Standards, Envt'l Prot. Agency, *8-Hour Ground-level Ozone Designations: Region 2: State Designations* (2004), http://www.epa.gov/ozonedesignations/regions/region2desig.htm (last visited Dec. 5, 2006) (showing Region 2 ozone non-attainment counties); Office of Air Quality and Prot. Standards, Envt'l Prot. Agency, *8-Hour Ground-level Ozone Designations: Region 3: State Designations* (2004),

[4] EPA Region 2 is comprised of New York, New Jersey, Puerto Rico, and the Virgin Islands. *See* Envt'l Prot. Agency, *About EPA: Regions*, http://www.epa.gov/epahome/locate2.htm (last visited Dec. 5, 2006).

[5] EPA Regions 3 is comprised of Pennsylvania, Maryland, the District of Columbia, Delaware, Virginia and West Virginia. *See id.*

http://www.epa.gov/ozonedesignations/regions/region3desig.htm (last visited Dec. 5, 2006) (showing Region 3 ozone non-attainment counties); Office of Air Quality and Prot. Standards, Envt'l Prot. Agency, *Fine Particle (PM 2.5) Designations: Region 2: State Designations* (2004), http://epa.gov/pmdesignations/regions/region2desig.htm (last visited Dec. 5, 2006) (showing Region 2 $PM_{2.5}$ non-attainment counties); Office of Air Quality and Prot. Standards, Envt'l Prot. Agency, *Fine Particle (PM 2.5) Designations: Region 3: State Designations* (2004), http://epa.gov/pmdesignations/regions/region3desig.htm (last visited Dec. 5, 2006) (showing Region 3 $PM_{2.5}$ non-attainment counties).

Hence, the Counties' flow control measures will provide an additional benefit of eliminating thousands of miles unnecessarily traveled by polluting diesel long-haul trucks inside and outside the Counties' borders.

CONCLUSION

For the foregoing reasons, the decision of the Second Circuit should be affirmed.

Respectfully submitted,

MICHAEL J. BEAN
Counsel of Record
JAMES T.B. TRIPP
ISABELLE SILVERMAN
J. CULLEN HOWE
Environmental Defense
257 Park Avenue South
New York, New York 10010

Counsel for Amicus Curiae

Supreme Court U.S.

No. 05-1345

In The

Supreme Court of the United States

UNITED HAULERS ASSOCIATION INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., and INGERSOLL PICKUP INC.,

Petitioners,

v.

ONEIDA HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, and COUNTY OF HERKIMER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICUS CURIAE* FEDERATION OF NEW YORK SOLID WASTE ASSOCIATIONS IN SUPPORT OF RESPONDENTS

MICHAEL D. DIEDERICH, JR.*
361 Route 210
Stony Point, NY 10980
(845) 942-0795

*Counsel of Record

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF THE AMICI CURIAE 1

FACTS 3

"Title to trash"—in the people and their government 4

Expectation of Proper Trash Management 4

Benefits to Rockland and New Jersey citizens, if Oneida & Herkimer counties manage its trash locally 6

Loss of Democracy 7

POINT I
THE GUARANTEE CLAUSE PROMISES DEMOCRACY, INCLUDING OUR LOCAL GOVERNMENT'S ABILITY TO MANAGE OUR TRASH 8

POINT II
A PRINCIPLED APPROACH TO MUNICIPAL SOLID WASTE MANAGEMENT— APPLY THE "GOLDEN RULE" 11

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) 2, 9

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 7

Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources, 511 U.S. 93 (1994) 7

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 8

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 9

National League of Cities v. Usery, 426 U.S. 833 (1976) 8

Oregon Waste Services v. Department of Environmental Quality, 511 U.S. 93 (1994) 7

United States v. Morrison, 529 U.S. 598 (2000) 8, 9

United States v. Lopez, 514 U.S. 549 (1995) 8, 9

Wickard v. Fulburn, 317 U.S. 111 (1942) 9

Statutes

Resource Conservation & Recovery Act ("RCRA") ..... passim

Other Authorities

Does Garbage Have Standing?--Democracy, Flow Control and Solid Waste Management, 11 PACE ENVT'L L. REV. 157 (Fall 1993) 2, 7, 10, 11

Wikipedia, at http://en.wikipedia.org/wiki/Subsidiarity 8

Constitutional Provisions

Commerce Clause, U.S. Const., art. I, § 8, cl. 3. ..... 7, 8, 9

Guarantee Clause, U.S. Const., art. IV, § 4 ..... 7, 10

Tenth Amendment, U.S. Const., Amend. X 8

BRIEF FOR *AMICI CURIAE* ROCKLAND COALITION FOR DEMOCRACY & FREEDOM, and the ROCKLAND COUNTY CONSERVATION ASSOCIATION

STATEMENT OF INTEREST OF THE AMICI CURIAE

This *amici curiae* brief[1] is submitted on behalf of two volunteer citizens' groups, the Rockland Coalition for Democracy and Freedom ("RCDF"), and the Rockland County Conservation Association ("RCCA"), each located in Rockland County, New York, approximately 200 miles south of Oneida and Herkimer counties. Your *amici* have no economic interest whatsoever in the Oneida-Herkimer system. Your *amici*, however, have a strong interest in the public interest, principles of democracy, and the local, regional, national and international environment.

Your *amici's* counsel, Michael Diederich, Jr., is a member of both organizations. He has a longstanding interest in the subject of flow control, beginning with his preparation of an amicus brief on behalf of Rockland County in the *Carbone*[2] case, when he served the public as an assistant county attorney. Before serving a one year tour of active military duty in central Iraq, he briefed and argued in support of Respondent in the *United Haulers I* appeal,[3] which decision

---

[1] No portion of this brief was authored by counsel for a party, and no person or entity other than the *amici curiae's* counsel Michael Diederich, has made a monetary contribution to the preparation or submission of this brief. The Petitioner and Respondent have each consented to the filing of this brief and their respective letters of consent have been filed with the Clerk of the Court.

[2] *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).

[3] *United Haulers Assn v. Oneida-Herkimer Solid Waste Management Authority*, 261 F.3d 245 (2d Cir. 2001). Counsel argued for an *amicus*.

is on review here. He has written a number of articles and otherwise been involved in the subject of solid waste flow control.[4]

The RCDF and RCCA are both longstanding local citizen organizations, entirely volunteer, whose members reside in Rockland County. The RCDF has for over a decade focused on issues relating to the First Amendment and democracy. The RCCA has, since being founded in 1930 as a not-for-profit corporation, taken a leadership role on environmental and conservation issues in Rockland County and the region. Your *amici* view a local government's ability to control its own people's trash in an economical and environmentally sound manner as important to both democracy and the natural environment. Accordingly, your *amici curiae* urge affirmance.

FACTS

The governmental Respondents, from the point of view of your *amici*, engage in prudent, democratically chosen, local waste management. Your *amici* support this. Your *amici* believe that state and local government should constitutionally be permitted to engage in waste management which is sound and comprehensive. Moreover, future conditions may warrant even more thorough local efforts, for

---

[4] *See, e.g., Does Garbage Have Standing?--Democracy, Flow Control and Solid Waste Management*, 11 PACE ENVT'L L. REV. 157 (Fall 1993); *Treatise Chapter: Municipal Solid Waste Management*, NEW YORK ENVIRONMENTAL LAW SERIES (Lawyers Cooperative, 1995); *Can Municipalities Manage Their Own Solid Waste*, ENVIRONMENT MAGAZINE (May 1995); *Practitioner's Perspective: In Light of Carbone: Who Owns Municipal Solid Waste?*, THE NEW YORK ENVIRONMENTAL LAW REPORT (April 1995); *Keep Democratic Rule over Trash*, ABA SECTION OF NATURAL RESOURCES, ENERGY AND ENVIRONMENTAL LAW, Nov./Dec. 1994; *Garbage and the Constitution: Democracy Collides with the Commerce Clause*, N.Y.S. BAR ASSOCIATION'S ENVIRONMENTAL LAW SECTION JOURNAL (May 1994).

the benefit of the people and the environment.

The people of the State of New York, and the voters of Respondent Oneida and Herkimer Counties through their elected representatives, have authorized the Oneida-Herkimer system. They have taken the words of Congress, expressed in RCRA, to heart, by creating a system of semi-monopoly public control over the communities' solid waste which allows private sector haulers to operate within the State-authorized monopoly system. This is a monopoly designed to benefit the public, including both the local and the national interest.

If every community in the country adopted this, or an even more aggressive system of waste management practice eradicating the citizenry's locally generated solid waste, the national policy goals of RCRA will have been achieved in a manner consistent with the vision of Congress. The citizens of the community, the State and the country would benefit. The Nation's environment, and even the Earth's, will be better protected, because with less waste comes more efficiency, less unnecessary natural resource consumption (for example, the creation of excess packaging and unnecessary "throwaway" products), and less natural resource damage related to waste disposal (unnecessary landfill space, transportation, air pollution and other environmental "externalities").

"Title to trash"—in the people and their government

As "average citizens," your *amici* observe that the Oneida-Herkimer system requires, through its counties' "flow control" laws, that all the citizenry's trash placed curbside be brought to the system's public facilities. If a similar flow control ordinance were in effect in Rockland County, as we believe there is with regard to at least some components of the waste stream, we would presume the ordinance legal, and that the trash collection firms whom we pay to pick up the trash would be required by operation of

law to bring our trash to our designated public facilities.

Our members would not ordinarily ask our trash collectors this directly. Rather, we would expect them to abide by the local law, with their interest in our trash lasting only as long as the short trip to a local designated disposal site, for example, a public landfill, waste to energy plant, recycling facility or transfer station. We would expect nothing different than, by analogy, the local school bus company bringing our children to the local public schools, or that the constable bringing criminals to the local jail, or a public water company the water to our faucets, or the sewer district our sewage to the treatment plant.

As a form of personalty, we would expect that our trash collector is merely a temporary bailee of our trash, under a constructive bailment required by local flow control laws to bring the trash to our public facilities.

Expectation of Proper Trash Management

As to our carters who bring trash to our public facilities, we would not anticipate that our local government would allow improper or environmentally unsound disposal. Nor would we expect that our local government would discriminate against out-of-state or out-of-county waste management firms.

Rather, we would expect proper public management of our trash by our agencies of government, in a manner consistent with State law, and consistent with long-range solid waste management planning conducted by our county in establishing a State-required solid waste management plan under the guidance provided by federal law (RCRA) and federal agencies (the EPA). We also expect value and competition from our tax dollars, not discrimination, cronyism or political patronage.

As citizens, we believe we have the right to compost our own "green" (organic) household wastes, or to bring our

glass and aluminum cans ("recyclable waste") to a recycler,[5] and it seems to us that we also have the right to collectively perform such "waste management" either as a neighborhood, or as a village, town, county or bi-county effort.[6]

And we are, as citizens, cognizant that natural resources are not unlimited; that scarcity of disposal sites and transportation costs create uncertainty regarding our community's future abilities to dispose of our solid waste; and that improperly managed municipal solid waste can result in pollution (sometimes accidental, sometimes not), thereby threatening the natural environment and our taxpaying pocketbooks. We rely on our local government to properly manage our wastes.

Benefits to Rockland and New Jersey citizens, if Oneida & Herkimer counties manage its trash locally

In examining the Oneida-Herkimer system, located 200 miles away from Rockland County, we see only benefit to us if its citizens, through its monopoly system, manage their own solid wastes properly. The local management by our upstate friends will result in less transportation of raw trash, for example, fewer garbage trucks traveling down the N.Y.S. Thruway and over the Tappan Zee bridge or into neighboring New Jersey, and fewer garbage barges being towed down the Hudson River.

---

[5] We can also sell scrap metal to a junk yard, or return our 5 cent deposit cans to the grocer, but these items are not "waste," because they have value. The only material at issue in this appeal is solid waste—valueless material which we "pay to get rid of."

[6] Solid waste management should be at the appropriate level of government. In this, we find guidance from both federal and state law describing appropriately sized units of government to manage the citizenry's solid waste. *See, e.g.*, Resource Conservation & Recovery Act ("RCRA") § 4002 (a)(planning units), § 4006 (c)(3)(local plans) & § 4009 (rural counties assistance).

Moreover, the consolidation of waste which is "recyclable" within the Oneida-Herkimer system will result in an improved ability to manage the recyclable material. Consolidation of material will help create better, and new, markets for the re-use of such waste. Source separation of specific materials, such as aluminum and newsprint will transform previously valueless waste into material with value, via economies of scale. Thus, while fewer garbage trucks or barges of raw garbage may pass through our county and northern New Jersey, we might expect an increase of recycled material, which recycling benefits not only the environment, but also the economy.

However, a public waste management system is needed to accomplish such waste reduction and recycling. Aluminum cans and newsprint are thrown away by residents precisely because this is, to them, mere waste. Planning, education and government action are needed to create order and discipline over our trash, for example, to determine which recyclable materials households should set out at the curb for collection.

Loss of Democracy

Finally, it is of great concern to your *amici* if this Court is to hold that they cannot, through their representative government, self-manage their locally-generated solid waste.

Your *amici* believe that responsible citizens should expect, and demand, that their government act on their behalf. Of course, government must be respectful of individual rights, and also avoid conflict with government of other communities. State and local government certainly should not take action which discriminates against the citizens (or the businesses) of other States.

Democratic choice also allows a citizenry to employ the private sector to assist with managing problems. If we, through our county government, choose to contract for

landfill disposal available at the landfill owned by Sussex County, Virginia, this should be our democratic right, and the State of Virginia should not be allowed to prevent our contracting for the use of Sussex County's landfill, if other communities use it. New York City finds that it needs to export its trash. This Court protects such democratic choice under its *Philadelphia v. New Jersey*[7] case law.

At the same time, as ethically responsible citizens, we prefer that every community "do the right thing" by self-managing its own waste, if possible, as this makes common sense, and comports with the "proximity principle" of environmental law, that pollution problems are most efficiently managed closest to the source. Landfilling our county's waste in Virginia, and burdening New Jersey's and Maryland's highways in the process, makes no sense if we can reduce and manage the waste ourselves, locally.

POINT I
THE GUARANTEE CLAUSE PROMISES DEMOCRACY, INCLUDING OUR LOCAL GOVERNMENT'S ABILITY TO MANAGE OUR TRASH

The Guarantee Clause[8] promises the American people a "republican form of government." It is a guarantee of representative democracy. Democracy is the heart of our country. We have successfully exported it overseas, to post-war Germany and Japan. We are trying to establish it in Iraq. We take it seriously nationally and internationally. We must take it seriously locally.

Elected officials at every level of government represent the people. The "subsidiarity principle" of government,

---

[7] *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). *See also, Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*, 511 U.S. 93 (1994); *Oregon Waste Services v. Department of Environmental Quality*, 511 U.S. 93 (1994).

[8] U.S. *Constitution,. art. 4, § 4.*

implicit in the Tenth Amendment and the principles of federalism, is that government is best run closest to the people.[9]

The Court knows its role in our federal system of government. It sometimes makes adjustments. For example, it sought to protect principles of federalism in *National League of Cities v. Usery*, 426 U.S. 833 (1976), where it recognized various traditional activities of the local government such as law enforcement, schools and sanitation, but later decided to defer to the national political process and structure of our federal system in protecting state and local sovereignty. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

Notwithstanding, the Court in *United States v. Lopez*, 514 US 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000) made clear that federal legislative powers are not without limits under the affirmative Commerce Clause,[10] invalidating federal regulation of guns at schools and violence against women because such are matters of state concern not sufficiently affecting interstate commerce.[11] Respectfully, waste reduction or eradication, because it is socially beneficial, has no adverse effect on interstate commerce whatsoever. These should, therefore, be viewed as posing less potential adverse effect on interstate commerce than the effects alleged in *Lopez* and *Morrison*. Public self-eradication of its citizenry's discarded trash has

---

[9] For a brief general discussion, *see Wikipedia, The Free Encyclopedia*, at http://en.wikipedia.org/wiki/Subsidiarity. *See also, Does Garbage Have Standing, supra*, at 165 n. 21, 202, n. 185 and 203 and accompanying text.

[10] *Const. art. I, § 8, cl. 3.*

[11] In *Lopez* and *Morrison*, the Court emphasized the need to prevent Congress from interfering with "local" areas of "traditional state concern." *See, Lopez*, 514 U.S., at 564-68 (Kennedy, J., concurring); *Morrison*, 529 U.S. at 611-19.

no adverse effect upon commerce "among the states" at all, whereas in *Lopez* and *Morrison* adverse affects were at least arguable.

Community self-management of its waste, like self-management of its crime, fire, local health and schoolchildren's education, should not be viewed as implicating interstate commerce. As such, Congress (at least arguably) is without power to regulate such activity under the affirmative Commerce Clause. *Cf., Wickard v. Fulburn*, 317 U.S. 111 (1942). Moreover, Congress has not sought to exert such power, but in RCRA has expressly deferred to the "primary" State and local role. *See,* 42 U.S.C. § 6901(a)(4). The Court should not extend the dormant Commerce Clause to reach this case.

The Court's dormant Commerce Clause cases invalidating regulation ordinarily involve overt discrimination against interstate business. There is no discrimination against interstate business present in the Oneida-Herkimer system. In fact, there is no discrimination against <u>any</u> business. Citizen dollars, under the flow control ordinance, flow through the temporary possessor of the citizens' waste (the bailee waste collectors) to the lawful waste destination (the public facilities). There is no residency requirement for any of the waste haulers—any company from any state can work in Oneida and Herkimer counties. The citizens' dollars pay for the comprehensive Oneida-Herkimer system of providing recycling, education and economical, environmentally secure waste disposal. To the extent that the system needs to employ the private sector, this is done on a non-discriminatory basis.

Nor is there any "excess burden" on interstate commerce present here, because reduction or elimination of waste must, as a matter of law, be viewed as no burden at all. *Cf., Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 473, n. 17 (1981)(waste reduction as a proper goal of Minnesota's

ban on plastic non-returnable milk containers). Rather, waste reduction is encouraged by federal law, state law, and general principles of environmental law. *See, e.g.*, RCRA subtitle D, 42 U.S.C. subchapter IV. It is like eliminating crime, fire, disease or dental cavities. The people have the right to reduce or eliminate undesirable things. This is a proper governmental activity. If the local citizenry can eradicate all of its waste, entirely, no one has legitimate cause to complain.

This Court must preserve the People's right to local democracy. This Court should not deprive the citizens of Oneida and Herkimer Counties of their right to self-governance over local solid waste. To do so will mean that we citizens of Rockland County will similarly have no power to govern our own solid waste destiny. We too will be deprived of the democracy promised by the Guarantee Clause.

POINT II

A PRINCIPLED APPROACH TO MUNICIPAL SOLID WASTE MANAGEMENT— APPLY THE "GOLDEN RULE"

Your *amici*'s counsel wrote a law review article entitled "*Does Garbage Have Standing?*," *supra*, *note 4*, on the subject of flow control prior to this Court's decision in *Carbone*. The article provides a principled constitutional basis for this Court's evaluation of the present case.

Federal law encourages waste reduction and environmentally sound, economically efficient, solid waste management. This requires public sector control over waste. The waste industry profits with increased volume of waste. Conversely, public control over waste that promotes waste reduction and recycling potentially reduces profits of trash disposal companies. Denying the public the ability to control its own trash places the waste industry in charge. The private fox then guards the public henhouse.

Garbage management has been, from prehistoric times, a municipal activity, which federal policy recognizes today as a primarily state and local governmental activity. *Id.*, 11 PACE ENVT'L L. REV. at 161-166. The concept of "home rule" over a community's solid waste is consistent with principles of federalism, the proximity principle of environmental law, and the express provisions of RCRA. *Id.* 168-197. If every community in the nation, and even the world, self-managed its own waste to the maximum extent practical, the world economy and the world environment would benefit. *Id.* 201-208. International trade wars will not result from countries "hoarding" pollution, whether solid waste or otherwise. *Id.* 204-05.

If a foreign country (or a domestic county, such as Sussex, Virginia) wishes to become a "pollution haven," it retains this right to contract with whomever needs to procure its services.

Although your *amici* and their counsel were unfamiliar with the Oneida-Herkimer system when *Does Garbage Have Standing* was written, Respondents' is a system which exemplifies the principled approach set forth in the article. It allows self-rule and self-management of a community's own waste, and export of the waste if this is desired or necessary. It is an approach which this Court can embrace—sensible and easy to apply.

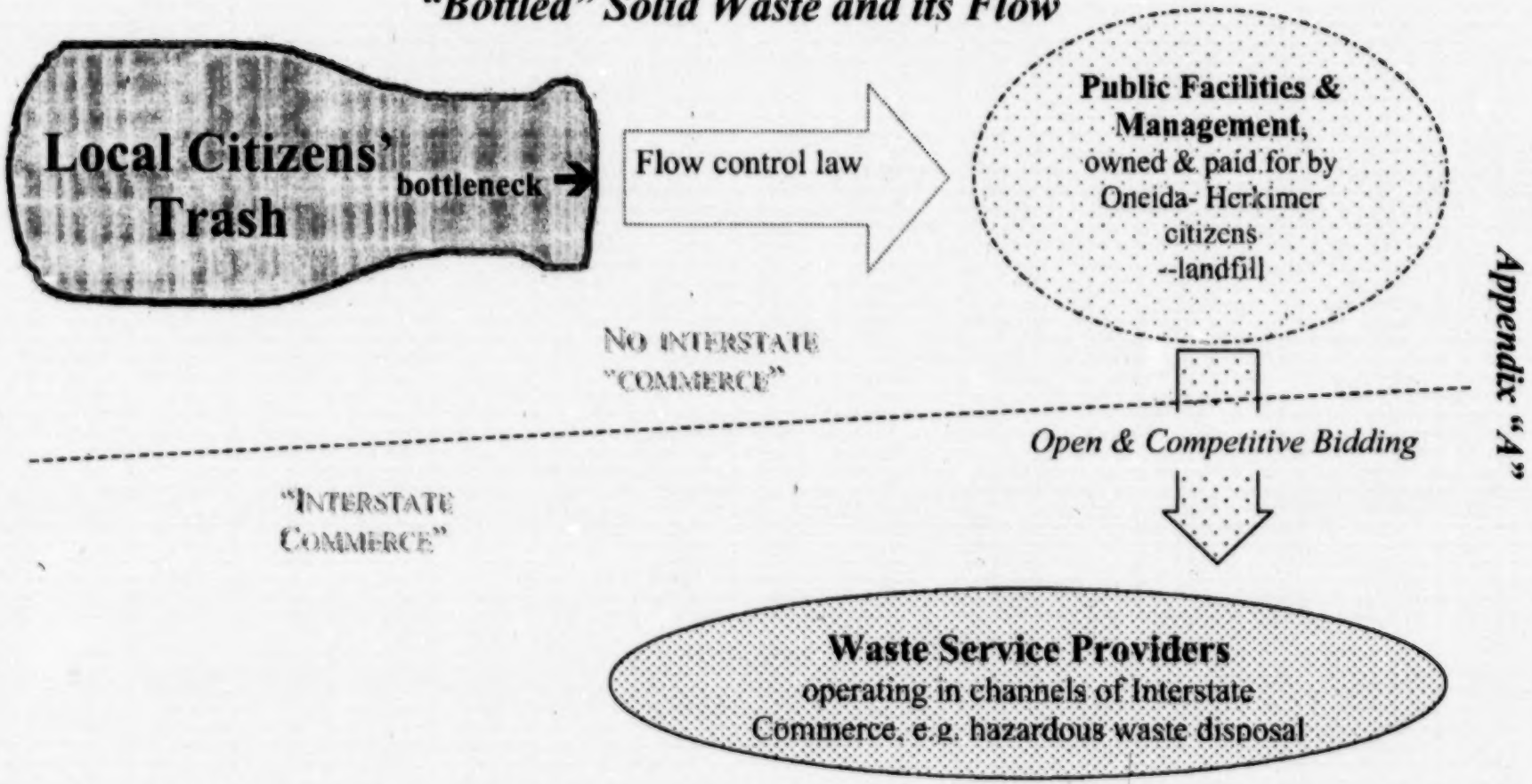
CONCLUSION

Your *amici* urge that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

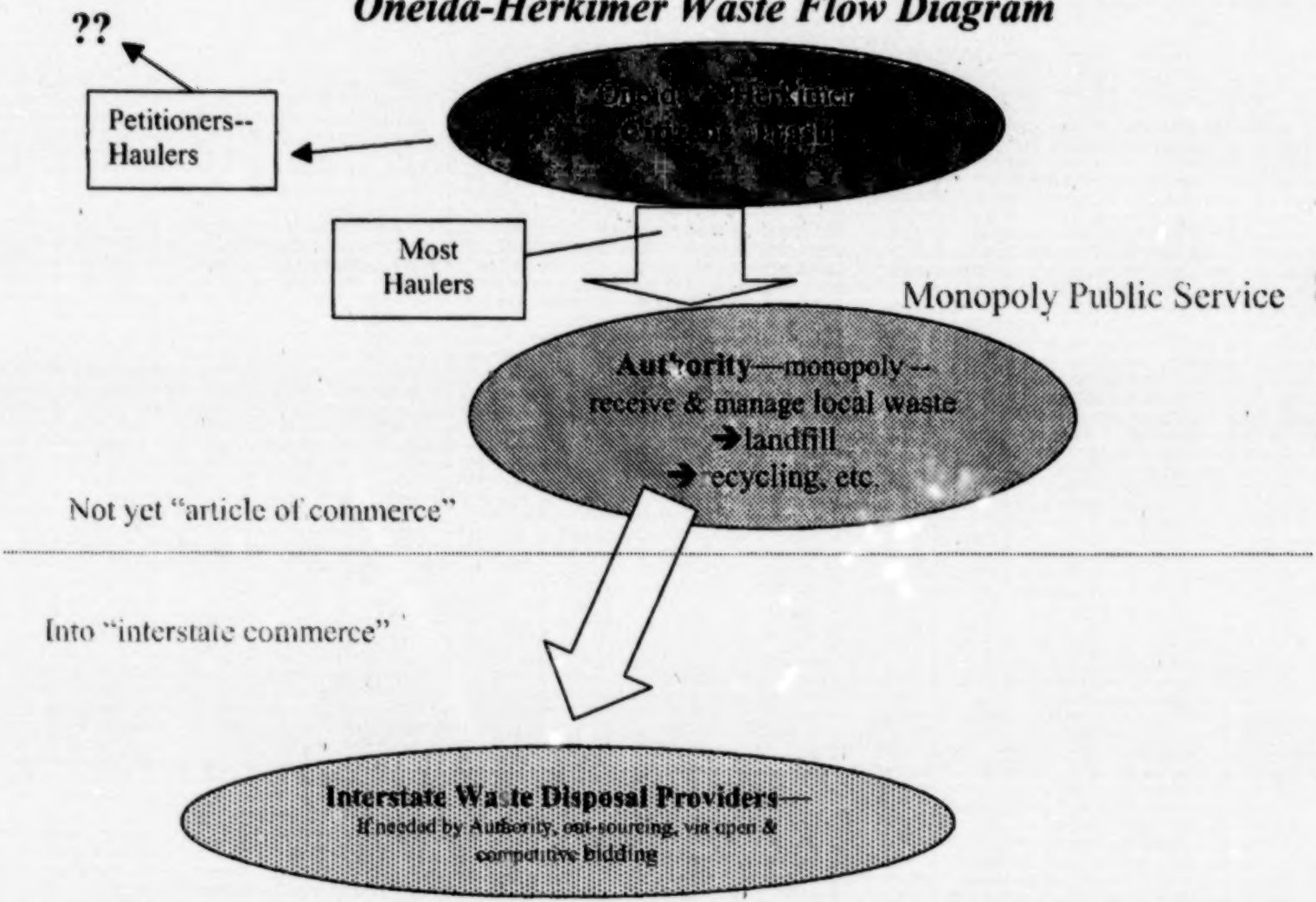
MICHAEL D. DIEDERICH, JR.*
361 Route 210
Stony Point, N.Y 10980
(845) 942-0795
Attorney of Record for Amici Curiae

"Bottled" Solid Waste and its Flow



Appendix "A"

Oneida-Herkimer Waste Flow Diagram



8929

No. 05-1345

IN THE

Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., *et al.*,

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF MADISON COUNTY, NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

S. JOHN CAMPANIE
County Attorney
Madison County
North Court Street
P.O. Box 635
Wampsville, NY 13163

JEFFREY B. MORRIS
Counsel of Record
TOURO LAW SCHOOL
300 Nassau Road
Huntington, NY 11743
(718) 428-3507

MICHEL J. DEBOTTIS
Madison County
Solid Waste and Recycling
Committee Chairman
230 Main Street
Oneida, NY 13421

Counsel for Amicus Curiae

205274

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
THE PRE-CONSTITUTION ERA	4
FROM THE ERA OF THE CONSTITUTIONAL CONVENTION TO THE FIRST CHOLERA EPIDEMIC (1787-1832)	6
FROM THE FIRST CHOLERA EPIDEMIC TO THE END OF THE AMERICAN CIVIL WAR (1832-65)	9
FROM THE LAST CHOLERA EPIDEMIC TO THE BEGINNING OF THE "GOLDEN AGE OF PUBLIC HEALTH" (1866-1894)	11
FROM NEW YORK CITY'S REFORMS TO THE NEW DEAL (1895-1932)	15
FROM THE NEW DEAL ERA TO THE CREATION OF THE ENVIRONMENTAL PROTECTION AGENCY (1933-70)	19
THE ERA OF GREAT ENVIRONMENTAL CONCERNS (1970-to date)	22
CONCLUSION	27

TABLE OF CITED AUTHORITIES

Page

CASES

Clason v. Indiana,
306 U.S. 439 (1939) 20

Parker v. Brown,
317 U.S. 341 (1943) 20

United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority,
261 F3d 245 (2d Cir. 2001) 3

FEDERAL STATUTES

Comprehensive Environmental Response, Compensation and Recovery Act
42 U.S.C. § 9601 *et seq.* 24

Resource Conservation and Recovery Act,
42 U.S.C. § 6901, *et seq.* 22

42 U.S.C. § 6943 22

42 U.S.C. § 6945 23

STATE STATUTES

NYS General Municipal Law Section 120-ww 24

NY Solid Waste Management Act of 1988, c.70 Codified as amended in scattered sections of Article 27 of N.Y. Environmental Law 25

Cited Authorities

Page

MISCELLANEOUS

Beth, Loren P, *The Development of the American Constitution 1877-1917* (1971) 13, 14

Bureau of the Census, U.S. Department of Commerce, *Historical Statistics of the United States, Colonial Times to 1970* Part 2 (1975) 9

Burrows, Edwin G. & Mike Wallace, *Gotham A History of New York City: A History of New York* City to 1898 (1999) 8, 10, 16

Blumberg, Louis & Robert Gottlieb, *War on Waste* (1989) 14, 17, 19, 20, 21

Duffy, John, *The Sanitarians: A History of American Public Health* (1990) ..... *passim*

Goodnow, Frank J., *City Government in the United States* (1904) 16

Griffith, Ernest S., *A History of American City Government: The Conspicuous Failure, 1870-1900*, (University Press of America 1983) (1938) 7, 11, 13, 15, 16

Griffith, Ernest S., *A History of American City Government: The Progressive Years, and Their Aftermath* 192ff (University Press of America 1983) (1974) 10

Cited Authorities

Page

Griffith, Ernest S. & Charles R. Adrian, *A History of American City Government: The Formation of Traditions*, 1775-1870 (University Press of America 1983) (1976) 8, 9, 10

Melosi, Martin V., *Garbage in the Cities: Refuse, Reform and the Environment, 1880-1980* (Texas A&M University Press 1981)[1] 3, 6, 7, 13, 14, 17

Melosi, Martin V., *Garbage in the Cities: Refuse, Reform and the Environment* (rev. ed. University of Pittsburgh Press 2005) (1981) 4

Miller, Benjamin, *Fat of the Land: Garbage in New York The Last 200 Years* (2000) 9

Morris, Richard B. & Jeffrey B. Morris, *Encyclopedia of American History* (7th ed. 1996) 5

Morse, William Francis, *The Collection and Disposal of Municipal Waste* (1908) 14

Rosenberg, Charles E., *The Cholera Years* (rev.ed. 1987) (1962) 10, 13

Savas, E.S., *The Organization and Efficiency of Solid Waste Collection* (1977) 5, 7, 14

Peter T. White, *The Fascinating World of Trash*, 163Nat'l Geographic, April 1983, at 424, 456 ... 18

1. All references are to this edition unless otherwise noted.

Cited Authorities

Page

Winslow, C.F.A., *The Evolution and Significance of the Modern Public Health Campaign* (Journal of Public Health Policy ed. 1984) (1923) 7, 10

INTEREST OF AMICUS CURIAE

Madison County, New York is largely rural. Part of the county has generally level to gently rolling topography while the rest consists of rounded hills and steep-sided valleys. Its area is 661 square miles, with a population of 69,441 at the time of the 2000 census. Most residents work in the nearby cities of Syracuse and Utica, although the county has nearly seven hundred active farms. The county has one city, fifteen towns and ten villages. Madison County is home to several industrial facilities, banking and other commercial institutions, four colleges, numerous small business, and agricultural enterprises.

Madison County's comprehensive solid waste management plan, which is similar to that of Oneida and Herkimer Counties, is an example of a modern local government that properly manages all of the solid waste generated within it. Madison County, as a state-designated planning unit, operates its landfill and four transfer stations, materials recycling facility, yard waste composting facility, household hazardous waste program, television and computer recycling, sharps disposal and other programs pursuant to its NYS-approved Solid Waste Management Plan. As part of its integrated system, the County adopted a flow control law in 2001, similar to Oneida and Herkimer's, which directs all locally-generated municipal solid waste and recyclables to its transfer stations, landfill and recycling center.

Madison County's interest in this litigation is clear. For many years the County, witnessed and endured many of the same problems as Oneida and Herkimer counties: poorly managed local municipal dumps resulting in significant environmental and legal problems, and private operators in a market lacking competition holding municipalities hostage to ever increasing costs. Like Oneida and Herkimer counties, Madison County stepped into the breach to ensure that its residents' waste was properly disposed of, recycled to the

greatest extent possible, at a reasonable cost. Thus, like OHSWMA, it represents local government taking responsibility for ensuring the health and welfare of its citizens by properly managing solid waste pursuant to a system that includes flow control as an important element.

Madison County proffers this brief discussing the history of solid waste management in the United States in order to assist the Court in analyzing this case in the proper historical context, recognizing that solid waste management was and continues to be a core governmental function and that communities must be free to develop a system uniquely suited to their particular situation.

SUMMARY OF ARGUMENT

The Second Circuit Court of Appeals correctly decided that by local governments establishing themselves as the exclusive provider of solid waste disposal services within their jurisdiction, they are not in violation of the dormant commerce clause. The purpose of this brief is to place in historical perspective the role of local governments in the management of solid waste. Waste disposal has been and is a service that has traditionally been provided by local government and has been essential in protecting public health and welfare. Every major advance in the science and technology of waste management has come from the active involvement of local governments, confirming that a strong municipal role is vital to the solution of the current and future garbage crises. The Respondents in this case are correct, that for many communities to carry out their commitment to innovation in waste management, enactment and implementation of flow control regulations or conditional regulations in private contracts are essential.

ARGUMENT[2]

The purpose of this brief is to place current issues in the management of solid waste in historical perspective. Basically, there is nothing new about the role of local governments in handling such waste. Throughout American history, local governments have had the primary responsibility for the removal, processing and disposal of solid waste. Martin Melosi, a leading historian of American solid waste collection has stated, "The question of municipal responsibility for collection and disposal has long been resolved."[3] The Second Circuit spoke in the first *United Haulers* case of the "well-settled principle that waste disposal is a traditional local government function."[4] Like police and fire protection, parks and public schools, the collection of garbage and its disposal has been a core function of local government; a function inherent in the state police power to provide for the health and welfare of its residents. The chief contemporary reason for the exercise of this power by municipal authorities is to protect the environment.

Today, some counties, cities and towns directly collect, process and dispose of the solid waste themselves. Other cities and towns award exclusive or non-exclusive franchises to handle part or all of these functions while incidentally regulating the private waste-service sector. There is nothing new about this. Today, as during much of the Nineteenth Century and the entire Twentieth Century, citizens of cities and counties expect that their government will in some way provide for collection

---

2. This brief was co-authored with Shari G. Newman, a 2006 graduate of Touro Law School. The authors acknowledge the assistance of Benjamin Miller, former director of policy planning for the New York City Department of Sanitation and advisor in environmental policy to many organizations.

3. Martin V. Melosi, *Garbage in the Cities: Refuse, Reform and the Environment, 1880-1980*, at 194 (1981 ed.).

4. *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 261 F.3d 245, 263 (2d Cir. 2001).

services and for processing and disposal facilities, just as they expect government to provide other essential services. In spite of a growing state, federal and private presence, municipal control of sanitary services has not been seriously eroded.[5] Surely, in an area that evokes such great public concern, it is essential that each community have the ability to establish a system that best serves its needs.

This is not to say that responsibility for solid waste is exclusively municipal. In addition to cities, counties, and private firms, state governments play a role, and so does the federal government, a role most recently articulated in the Resource Conservation and Recovery Act of 1976 and its subsequent amendments. The RCRA: redefined solid waste to include hazardous waste and ordered EPA to require "cradle to grave" tracking of hazardous waste and controls on hazardous waste facilities; closed most dumps and set minimum standards for waste disposal facilities—including criteria for facility sizes and locations—through rules and regulations promulgated through the states.[6]

THE PRE-CONSTITUTION ERA

The history of solid waste collection and disposal is intertwined with the history of the city.[7] Prior to 1787, the United

5. Melosi , *supra*, at 238.

6. Melosi [2005 ed.], at 203.

7. Sanitation tends to become a problem when there is population density. When human beings first gathered together in settlement, they had to establish places at the edge of their settlement to dispose of garbage. As early as 2500 B.C., the city of Mahego-doro in India possessed elaborate drainage systems as well as rubbish chutes in the homes of its residents. The city of Babylon had drains, cesspools and sewage systems, while Crete set aside areas for the disposal of human waste around the year 1500 B.C. The Greeks had the world's first municipal dump in 500 B.C., while Rome had sewers, great aqueducts and public latrines. Virtually all of the early civilizations protected food

(Cont'd)

States had few cities, and the entities classified as cities were very small (8,000 or more).[8] Solid waste problems tend to emerge when cities reach a certain level of population density. So long as there was unsettled land outside but near the city, garbage could be disposed of by individuals at the nearest convenient place without governmental activity. It was the growth of urban centers that made necessary elaborate and complex systems to handle solid waste.[9] As time proceeded, governments adapted environmentally-protective systems and requirements originally created for use by cities to all areas of the country, recognizing that public health and safety is necessary even in the most rural and seemingly isolated locations.

In the Seventeenth and Eighteenth Centuries, public health knowledge had advanced little from the Middle Ages. It would take more than a century before a critical mass of scientific studies presented a generally adequate picture of the causes of disease. Although there was very little "hard knowledge" about public health, cities nevertheless worried about a connection between unsanitary conditions and public health. By the end of the Seventeenth Century, several colonial towns had reached a stage in their development requiring them to pass basic sanitary laws. A 1652 Boston ordinance dealt with the construction of privies. In the Seventeenth Century, Boston regulated trades such as butchers and blubber boilers who fouled the environment and issued an ordinance dealing with garbage removal.[10]

(Cont'd)

and water from contamination. The Minoans had flush toilets. E. S. Savas, *The Organization and Efficiency of Solid Waste Collection* 11 (1977); John Duffy, *The Sanitarians: A History of American Public Health* 5-6 (1990).

8. Richard B. Morris & Jeffrey B. Morris, *Encyclopedia of American History* 631 (1996).

9. Savas, *supra*, at 11.

10. *Id.* at 16.

During the colonial era, municipal governments relied on the initiative of individual householders or businesses to manage their own wastes by sweeping up the organic and inorganic detritus from in front of their houses or places of business. At their best, streets were paved with cobblestones whose interstices usually became packed with accumulations of organic material and other debris that was impossible to remove by rinsing or sweeping. Unless it could be eaten by animals or used to fertilize crops, refuse was removed to low-lying lots or dumped in the nearest body of water.

As such conditions became intolerable, municipalities began to take responsibility for waste. The first was Boston, which in 1666-67 appointed a municipal scavenger. Scavengers, who become a standard feature of municipal life in the United States, were responsible for sweeping the streets, clearing them of animal carcasses, piles of kitchen waste and other refuse that might impede traffic or otherwise cause a nuisance.[11] While New York City did not appoint a scavenger until 1750, when cart men asked for a monopoly for transporting goods within New York City in 1670, the city made a condition that the cart men remove piles of dirt, rubbish and garbage from the streets every Saturday.[12]

FROM THE ERA OF THE CONSTITUTIONAL CONVENTION TO THE FIRST CHOLERA EPIDEMIC (1787-1832)

During the four decades between the commencement of government under the U.S. Constitution and the first great cholera epidemic to reach the United States, the American population grew rapidly, especially in its cities. In 1790, 5.1% of the population of the United States was city dwellers; in 1840, the figure would be 10.8%.[13] The great migration west led to

11. Duffy, *supra*, at 13, 28.

12. *Id.* at 16.

13. Melosi, *supra*, at 13.

the settlement of a number of smaller cities comparable or greater in population by 1832 to that of the Eastern cities in 1790. Furthermore, the cities had to cope with the profound dislocations caused by the Industrial Revolution—long hours and dangerous conditions in the factory and life in crowded tenements.

Throughout the colonial period, responsibility for street cleaning had been able to rest primarily in the hands of individual citizens.[14] But, by 1832, the chronic overcrowding in the Eastern cities made that no longer possible. Existing sewer disposal systems failed to meet the needs of the growing cities. Water was impure; unpaved streets reeked with waste.[15] The problem was accentuated by waste coming from tanning, slaughtering and other businesses. Furthermore, humans lived with and among domestic animals and their refuse was everywhere.[16] As a result, wave upon wave of communicable diseases spread—typhoid and yellow fever, small pox, cholera and childhood diseases such as diphtheria. Boards of Health had been created in some cities to deal with such matters, but neither laymen nor physicians had command of what would become fundamental principles of public health.[17]

The onslaught of yellow fever proved to be the first major impetus to the movement for sanitary reform. The first yellow fever epidemic to reach the United States hit Philadelphia in 1793. Perhaps one-tenth of the population of that city perished. Yellow fever would return again the following year and spread to other cities.

---

14. Duffy, *supra*, at 16.

15. Melosi, *supra*, at 14. See also Savas, *supra*, at 17.

16. Duffy, *supra*, at 13, 30, 88; Ernest S. Griffith & Charles R. Adrian, *A History of American City Government: The Formation of Traditions, 1775-1870*, at 66 (1938).

17. C.F.A. Winslow, *The Evolution and Significance of the Modern Public Health Campaign* 6 (1923, repr. 1984).

In New York City, a committee of the City Council placed the blame for the epidemic virtually on every sanitary problem of the day: foul-smelling slips, undrained lots, overflowing sinks and privies, burials within the city during the hot season (when, actually, the disease was mosquito-borne). The committee urged the municipality to plan for a waste system and build underground sewers, and in the meantime to hire carts and laborers for street cleaning and assume full responsibility for it. What the Council did do was to draft a bill, which was passed by legislature, which gave the municipal government full control over sanitary matters.[18] Elsewhere, town after town began major efforts to drain pools, clear drains of carrion, require residents to empty their overflowing privies.[19]

Yellow fever would recede from the North in the middle of the first decade of the Nineteenth Century, and no new great pestilence would threaten for over twenty-five years. As a result, governmental efforts to promote the public health and welfare were sharply reduced. With but a few exceptions, health boards disappeared.

Nevertheless, by 1830, nearly all major American cities had taken some responsibility for cleaning their streets. Individual residents were expected to sweep the dust in front of their homes or business establishments, but scavengers or cart men employed by the city, private contractors or even local farmers collected the material they had swept up. Further, by 1830, most of the larger towns regulated the construction, location and emptying of privies. Progress was made in securing healthful water, creating sewer systems and even in building regulations. Unfortunately, the effect of most of these accomplishments was nullified by rapid population growth.[20]

---

18. Duffy, *supra*, at 43; Edwin G. Burrows & Mike Wallace, *Gotham: A History of New York City to 1898*, at p. 43 (1999).

19. Duffy, *supra*, at 48.

20. *Id.* at 72. 73, 77; Griffith& Adrian, *supra*, at 152.

9

FROM THE FIRST CHOLERA EPIDEMIC TO THE END OF THE AMERICAN CIVIL WAR (1832-65)

As rapid growth of the nation's cities continued—between 1830 and 1860 the percentage of Americans living in cities of 10,000 more than doubled[21]— municipal governance had to come to terms with the problems this growth caused. Municipal responsibilities increased and a bureaucracy slowly began to develop. City services were established to deal with pressing needs.

The scourge of cholera and developments in public health knowledge led to increasing concern about solid waste. When the first of three cholera epidemics hit the United States in 1832, municipal responsibility for the removal of waste and for public health was still in an immature state. The streets of the nation's largest cities were filled with the giant heaps of excrement of men and animals, decaying garbage, putrefying carrion and stagnant pools in every low place. The markets were strewn with the heads of sheep, the hoofs of cattle, blood and offal, as well as dead dogs, cats, hogs and rats.[22]

While there was hardly any scientific knowledge of disease to be drawn upon, American cities still had to act to try to protect their residents. Towns and villages appointed boards of health. In almost every American city, sanitary surveys and reports were commissioned. Filth continued to be blamed for the epidemics. The reports recommended the building of water and sewer systems, the institution of street cleaning and garbage collection, the creation of strong health departments with extensive authority and the passage of sanitary measures that included among other things, the removal of waste from streets and

21. Bureau of the Census, U.S. Department of Commerce, *Historical Statistics of the United States, Colonial Times to 1970*, Part 2, at 11-12.

22. Griffith & Adrian, *supra*, at 69; Burrows & Wallace, *supra*, at 588, 787; Benjamin Miller, *Fat of the Land: Garbage in New York The Last 200 Years* 37 (2000); Duffy, *supra*, at 88.

private property.[23] While these recommendations would clearly contribute to improved public health and general public betterment, they would not by themselves eliminate cholera, typhoid fever, tuberculosis or the other great scourges.

Thus, as a result of the epidemics, municipal governments acted more assertively in dealing with sanitary problems. In certain localities, more comprehensive regulations to control the removal and disposal of waste materials were promulgated. As early as 1832, New York's Board of Health assumed many of the functions of Twentieth Century government– running hospitals and welfare services, providing for slum clearance, controlling the sale of food and drugs.[24] Streets and homes were cleared and "purified". In New York, 20,000 of its wandering hogs, long a problem, were driven to the City's Northern wards during the 1849 outbreak. By the beginning of the Civil War, New York's porkers were in exile north of 86th Street.[25]

Spurred by the need to respond to the periodic epidemics; aided by the emergence of vital statistics as a public health tool which demonstrated that dirt, congestion and bad air shortened lives; sensitized to the danger of poor drainage, foul water and crowded tenements; concerned about sewage, offal and dead animals; encouraged by the increasing role of medical societies in promoting public health, the stage was set in the large cities for greater municipal responsibility for street cleaning, garbage collection and pure water supply.[26] By the end of this period, there would be firmer institutional entrenchment of local governmental control in the management of sanitary affairs.

---

23. Duffy, *supra*, at 81, 99-100; Griffith & Adrian, *supra*, at 67; Rosenberg, *supra*, at 19; Ernest S. Griffith, *A History of American City Government: The Progressive Years, and Their Aftermath* 192ff (1974).

24. Rosenberg, *supra*, at 83.

25. Burrows & Wallace, *supra*, at 786. .

26. Griffith & Adrian, *supra*, at 8; Rosenberg, *supra*, at 143; Duffy, *supra*, at 67, 93; Winslow, *supra*, at 25ff.

FROM THE LAST CHOLERA EPIDEMIC TO THE BEGINNING OF THE "GOLDEN AGE OF PUBLIC HEALTH" (1866-1894)

The thirty-year period that followed the American Civil War was notable for remarkable developments in public health and for extraordinary breakthroughs in the understanding of disease. As the work of municipal governments increased greatly in complexity, they took on greater responsibilities for the removal of solid waste.

The lessons of the great wars of the era contributed to the growing involvement of the cities in waste collection and removal. The Crimean and the American Civil War produced considerable knowledge about the connection between uncleanliness and disease. The sanitary techniques pioneered by Florence Nightingale and others would come to be employed in civilian life by the same sanitary engineers who had applied them in the military camps. When such officers as General Egbert Ludovicus Viele and Colonel George E. Waring, Jr. returned to civilian life, they came to play an increased role in municipal management of liquid and solid waste.

Rising interest in the whole area of public health was stimulated by reports and surveys of public health conditions. New organizations were formed, such as the American Public Health Association (1872) that helped professionalize the field and produced seminal reports on conditions in America.[27]

Growing municipal interest in waste removal was also stimulated by revolutionary change in the field of medicine, where there were major advances in pathology, histology, physiology and chemistry. The 1880s was the decade that saw the identification of the organisms responsible for many killer diseases. The first wide-scale application of bacteriology to public health occurred with regard to diphtheria.

---

27. Ernest S. Griffith, *A History of American City Government: The Conspicuous Failure, 1870-1900*, at 53 (1983) (1938).

During this period, for the first time there was hard evidence that garbage was not only an aesthetic problem, but also one that greatly impacted public health. Typhoid fever, dysentery, pneumonia and tuberculosis were the normal hazards of tenement life. The need to make improvements in the collection of solid waste was identified as a critical component in the fight against those and other diseases.

The last twenty years of the Nineteenth Century saw the sanitary revolution in full swing. Towns and cities were establishing water and sewer systems, while health departments were expanding into new areas such as laboratory testing of water and milk.[28] Taken together, these advances—inspection, pasteurization, vaccination and immunization, attacks on mosquito-borne diseases and public education—led to a remarkable improvement in public health.

During the thirty years following the Civil War, municipal governments increasingly exercised their police powers and made assertive use of them. By 1870, virtually all of the modern municipal services had been established, at least at a rudimentary level, and were being operated in the large and middle-sized cities by full-time personnel. The larger cities had fire departments, salaried police and municipally sponsored schools.

One of the most striking features of the decades immediately after the Civil War was the growth in the number and effectiveness of municipal health departments. Among the most important developments was passage by the New York State Legislature of a law creating a Metropolitan Sanitary District (encompassing much of the yet unconsolidated New York City) and a Metropolitan Board of Health that was given substantial legislative and quasi-judicial powers. Within eight months of the Metropolitan Board of Health's creation in February 1866, 160,000 tons of manure were removed from vacant lots, 31,000 cease and desist orders issued, 4,000 lots ordered cleaned and 6,418 privies disinfected. In 1866, New York City suffered

28. Duffy, *supra*, at 125-26.

only one-tenth the number of deaths caused by cholera as compared with 1849. The Metropolitan Board of Health would prove to be the first effective health department in a major city and would become a model for urban health departments throughout the nation. Its work would demonstrate that disease was preventable through proper management of municipal solid waste and improved sanitation practices.[29]

The public health functions of municipalities varied. They could include tenement inspection, the collection of statistics, quarantining, water treatment, removing nuisances associated with foul odors and running the city's small pox hospitals and insane asylum.[30] The sanitary revolution in America was in full swing and health and sanitation were virtually synonymous. Elaborate water supply systems were constructed. Old sewer lines were expanded and new ones built. Most heavily-traveled streets were paved. The collection of garbage and refuse was improved and new facilities for the disposal of garbage provided.[31]

The United States Census first collected information on the management of municipal solid waste in 1880. Of the 199 cities surveyed, 68.8% directly managed waste removal and disposal services—either through private contracts, the use of public facilities and personnel, or through some combination thereof. Because a reliance on individual initiative became increasingly impractical as population density increased, the provision of waste management and disposal services by the public sector was particularly prevalent in the larger cities. In 1880, only 21% of cities with a population of at least 30,000 did not provide these services in one form or another.[32]

---

29. Rosenberg, *supra*, at 210, 212, 239; Duffy, *supra*, at 118ff.

30. Griffith, *A History of American City Government: The Conspicuous Failure*, *supra* at 8ff; Duffy, *supra*, at 142-43,

31. Griffin & Àdrian, *supra*, at 224; Loren P. Beth, *The Development of the American Constitution 1877-1917*, p. 101.

32. Melosi, *supra*, at 31.

Of the cities surveyed in the 1880 census, 94% had a board of health commissioner or a health officer. Of those, 46% had some direct control over the collection and disposal of refuse.[33] That year, only 24% of those services were actually run by a city. The figures jumped to 65% in 1900.[34] By the turn of the century, a growing number of cities provided at least a rudimentary level of solid waste collection and disposal.[35]

Cities and towns were also concerned with what was done with the collected garbage, although they lacked modern sensitivity to environmental concerns. In many towns, refuse was dumped onto vacant lots. When the town grew, the refuse was consolidated at convenient points on low ground or on roads needing grading. Cities on the seaboard or on rivers that could conveniently do so dumped waste into waterways. Many New England cities and towns sold their swill to farmers. Several western cities also sold their garbage.[36]

By the end of this period, cities were responsible for sanitation and public health, as they were for elections, fire prevention and fire fighting, prevention and punishment of crime, education and the building and maintenance of roads and parks.[37] With considerable progress made in some cities with the provision of fresh water and construction of an adequate sewage system, the refuse problem finally captured the attention of urban dwellers. Sanitarians and public health officers offered health reasons for their concern; civil groups offered aesthetic reasons for improvement in collection and disposal; engineers provided new technologies.[38] Certainly, more needed to be done

---

33. Savas, *supra* at 2, 7.

34. Melosi (2005 ed.) 155.

35. Blumberg & Gottlieb, *War on Waste* 6 (1989).

36. William Francis Morse, *The Collection and Disposal of Municipal Waste* 2, 6, 48, 85, 328, 330, 364, 371(1908).

37. Beth, *supra*, at 93, 101.

38. Melosi, *supra*, at 49-50.

—especially with the disposal of municipal solid waste—but the cities were more engaged in the process in the late 19th Century.

By the 1890s, in some places the quality of urban life had really improved. In Memphis, for example, as late as 1879, the water supply had been polluted with excrement. Yards, alleys and gutters had been full of garbage, refuse, stagnant water and dead animals.[39] However, beginning around 1880 under the leadership of George E. Waring, Jr., sewer and water systems were improved and animals driven from newly paved streets. By 1890, Memphis had been transformed into one of the nation's cleanest cities. Its mortality rate had been cut in half over seventeen years.[40] This much could be said: as the Nineteenth Century drew to a close, the sanitary movement had finally begun to improve the quality of human life.

FROM NEW YORK CITY'S REFORMS TO THE NEW DEAL (1895-1932)

The last decade of the Nineteenth Century and first decade of the Twentieth may be properly called "the golden age of public health". It was during these years that the water-borne diseases (cholera, typhoid) and the insect-borne maladies (yellow fever, malaria) were conquered in the Northern Hemisphere. Considerable progress was made against other public health menaces. Increasingly, public health reformers linked sanitary practices to the incidence of disease and health risks in urban areas. Between 1900 and 1930, the life expectancy for the average American increased from 47.3 years to 59.7.[41]

The flagship of reform for municipal handling of solid waste was New York City. It was jump-started in 1895 by the

---

39. Griffith, *A History of American City Government: The Conspicuous Failure*, *supra*, at 41.

40. Duffy, supra, at 143-45.

41. Duffy, *supra*, at 256.

appointment of George E. Waring, Jr. as Street Cleaning Commissioner, heading a department previously notorious for inefficiency and corruption. With Waring's appointment, the first practical, comprehensive system of refuse management in the United States was created. Waring's force was professionalized and organized in a military fashion. His uniformed "white wings" scoured the streets, arrested violators of the Sanitary Code, cut ocean dumping to a minimum and became nationally famous for efficiency and morale.[42]

In addition to keeping the streets clean, Waring devised a program for efficient source separation, collection and disposal of municipal solid waste that involved local communities and individual citizens. Waring's experiments when he was Street Cleaning Commissioner of New York were the first efforts made in the United States to systematize the collection and disposal of municipal waste. He employed a precursor of recycling that he had seen in Budapest: sorting waste by placing thin layers on a moving belt, where workers, standing on either side, picked out materials with market value or which could be put to a useful purpose providing revenue for the city.

Waring embodied the principle that, to achieve success in waste management, public welfare needed to take priority over private economic interests. Waring's waste management strategies embedded the notion that sanitation was a municipal responsibility.

By 1905, sanitary engineers and public health officers emerged as even more crucial "players" than before. Joined with other reformers, they demanded the termination or alteration of contracted collection and disposal (because of their susceptibility to corruption) and supported centralization of refuse

---

42. Griffith, *A History of American City Government: The Conspicuous Failure*, supra, at 4, 52; Duffy, *supra*, at 175; Burrows & Wallace, *supra*, at 1194-96; Frank G. Goodnow, *City Government in the United States*, 239-40 (1991 repr.) (1904).

management through municipal departments operating under the newest management techniques.[43]

For decades, professional engineers, public health officials, and civic reformers had strongly supported purely municipal operations, believing that sanitation was an inherently public responsibility that should be managed as a public utility. From the 1890s to the outbreak of the First World War, direct municipal provision of waste services (using municipally owned disposal facilities and municipal collection workers) increased substantially. Surveys conducted from the 1880s to the end of this period demonstrate increased municipal responsibility for direct collection of solid waste, street cleaning and disposal. In 1880, 24% of the municipalities surveyed took complete responsibility for collection and disposal while another 19% contracted out the service. In a 1902 survey of 161 cities, ranging in population from 28,000 to New York City's millions, 33.5% took complete responsibility and 30% contracted out their service. In a 1915 survey of 168 cities, 50% of the cities had municipally controlled collection service. Of the 96 cities surveyed in 1924, 63% had direct municipal collection.[44] Thus, whatever the manner of disposal, the health factor, odors and nuisances had established collection as an appropriate municipal function.

Cities employed a wide variety of methods to dispose of garbage. The evolution of waste disposal practices from the primitive dumping on land or sea to the building of large-scale industrial plants, also contributed to making local government's role in the management of municipal waste more widespread. The demand for the safe and instant disposal of dangerous matter could be met by the erection of facilities in which excrement, garbage, dead animals and combustible refuse were incinerated. In 1885, the first American incinerator was built. The first

43. Melosi, *supra*, at 80, 87ff, 113; Griffith & Adrian, *supra*, at 8.

44. Melosi, *supra*, at 28, 30, 98-100, 106-07, 113-16, 137, 139, 153-4, 197; Blumberg & Gottlieb, *supra*, at 8ff.

generation of incinerators was not successful. Of 180 incinerators built between 1885 and 1908, 102 had been abandoned by 1909. A second generation was built after 1910 and, more successful, achieved wider use.

Another important innovative method involved the technology of reduction through which it was possible to extract oils and other by-products through the compression of city garbage. The byproducts could be sold as lubricants, perfume base and fertilizer. Reduction, however, was unable to dispose of the inorganic elements of the waste stream. Few reduction plants remained in operation after the First World War.[45]

Reduction plants, like incinerators, were capital-intensive, "high technology" facilities. Both required waste management conducted on such a large scale. Only a government entity—or a contractor to a government entity—could muster the financial and technical resources required.

The widespread pattern of municipal provision of sanitation services in one form or another continued and similar ways of dealing with it emerged again and again: different generations of incinerators, waste-to-energy plants, recycling. Engineers became aware that in order for waste management programs to be productive, not only were large financial investments necessary, but specific, complex, detailed planning was necessary to account for the differences of each municipality. As a result, existing contract arrangements were modified to incorporate meticulous and necessary advances in waste management practices because private contractors were not willing to incorporate systems that required large capital investment and were more interested in keeping costs low. [46]

---

45. Melosi, *supra*, at 49, 152, 175; Blumberg & Gottlieb, *supra*, at 8ff.

46. Peter T. White, *The Fascinating World of Trash*, 163 Nat'l Geographic, April 1983, at 424, 456.

The post-war period brought new challenges. The progress between 1880 and 1920 had been limited to waste elimination. Much less thought was given to waste generation. By one estimate, the solid waste generated after the First World War increased five times as rapidly as the population. Between 1900 and 1920, each citizen of Manhattan, Brooklyn and the Bronx annually produced 50 to 100 pounds of rubbish, 160 pounds of garbage and 1231 pounds of ashes.[47] This would prove to be a more intractable problem. The automobile and chemical industries brought forth new collection and disposal products problems in the 1920s as did the unprecedented growth of packaging materials–paper goods, plastics, glass, aluminum, as well as toxic chemicals and synthetics.[48] While sanitary engineers had been able to solve the problems of municipal sewage and waterworks with advanced technology, they recognized that proper handling and disposal of solid waste required less knowledge of technology and more of human nature. The municipalities had to teach their residents how to consume less.

FROM THE NEW DEAL ERA TO THE CREATION OF THE ENVIRONMENTAL PROTECTION AGENCY (1933-70)

The growing trend towards municipalities taking complete responsibility for solid waste continued steadily in the 1920s and 1930s. Direct municipal collection predominated, but some municipalities instead used some form of contracts or franchise agreements. By the late 1930s virtually every city with a population exceeding 100,000 offered or contracted for collection and disposal services. In 1939, 78% of the 190 cities surveyed were directly responsible for collection and disposal.[49]

---

47. Melosi, *supra*, at 23.

48. *Id.* at 190.

49. Melosi, *supra*, at 197, 206; Blumberg & Gottlieb, *supra*, at 6; Savas, *supra*, at 36-7..

During this period the Supreme Court upheld the exercise of state police powers against Commerce Clause challenge in two significant cases. In *Clason v. Indiana*, 306 U.S. 439 (1939), the Court upheld a state law requiring transportation of waste under strict sanitary conditions by a licensed operator. The Supreme Court held that the mere power of the federal government to regulate interstate commerce did not prevent the states from adopting measures designed to secure the health and comfort of their people.

In *Parker v. Brown*, 317 U.S. 341, 367 (1943), the Court upheld an antitrust exemption for state and local regulation. The Court recognized a wide scope for local regulation without substantially impairing the national interest in the regulation of commerce, so long as the free flow of commerce was not materially obstructed.

After the Second World War, the further growth of the package industry led to a jump in the volume of municipal solid waste, as did the planned obsolescence of durable goods. Waste generation, thus, had become an essential by-product of economic activities.[50]

The first "sanitary landfills" had been established in New York City and Fresno in the 1930s. After the War, the sanitary landfill became a preferred alternative to open dumping. The rise of sanitary landfills also roughly coincided with the decline of incineration that began during the 1940s and the 1950s.[51]

The widespread pattern of municipal provision of sanitation services in one form or another continued after 1960.[52] There was a growing trend back toward private contracting. New environmental laws and regulations concerning landfills and incinerators resulted in the closure of relatively small-scale, non-

---

50. Blumberg & Gottlieb, *supra*, at xv, 11ff.

51. *Id.* at 17.

52. Melosi, *supra*, at 198.

compliant facilities owned by local governments. They were replaced by a much smaller number of much larger, regulatory compliant landfills (and a handful of incinerators), many owned by private sector firms.

During the 1960s, conglomerates began controlling a substantial portion of the residential as well as the commercial collection business. Through aggressive pricing and other marketing techniques, a relatively small number of firms and disposal facilities were able to secure contracts for the collection and disposal of a significant portion of the nation's waste, generally under detailed contracts with local governments. The widespread consolidation in the private waste industry resulted in a handful of large, vertically integrated, multi-national firms in place of hundreds of smaller, locally-based firms. The fiscal difficulties of many local governments contributed to the trend. Cities and counties sought to avoid upfront capital costs through the resort to private disposal facilities and the lower ongoing operational costs that were associated with private collection contracts. Although exclusive municipal collection declined, 65% of American cities maintained some degree of municipal control.[53]

Complete reliance on landfills diminished as they filled or failed to meet new standards. Communities began to look for other alternatives.[54] During the 1960s with increased regulation, additional permitting requirements and stepped-up monitoring of pollution, responsibility for the various aspects of collection became fragmented among many agencies, councils and other groups. Passage of the Solid Waste Disposal Act by the Congress in 1965 required no immediate changes, but brought attention to the problem of solid waste on a national scale. The federal government was authorized to grant financial incentives to state and local government for research, training

53. Melosi, *supra*, at 197.

54. *Id.* at 190, 197, 199ff, 202; Blumberg & Gottlieb, *supra* at 128.

and local demonstration programs. A product of the Act was the understanding that garbage was a problem extending beyond city limits. Inter-local, county-wide and multi-county arrangements began to make municipal boundaries less meaningful.

THE ERA OF GREAT ENVIRONMENTAL CONCERNS (1970-TO DATE)

By the 1970s, the solid waste problem was national. It had become apparent that federal and state funding were essential to any successful waste management system. In 1976, Congress passed the Resource Conservation Recovery Act (RCRA, 42 U.S.C. §6901, *et seq.*) that focused primarily on the need to change from disposal to recycling, resource recovery, and the conversion of waste to energy. RCRA established a comprehensive framework for managing hazardous and non-hazardous waste in an environmentally sound manner, including the requirement to properly handle and dispose of hazardous waste from cradle to grave. The EPA was made responsible for most national solid waste management activities.[55] But a state and local partnership was encouraged, pursuant to a system of State solid waste plans, 42 U.S.C. §6943.

Towards the end of the 1970s, there were growing health and environmental concerns about landfills. While the problem of contamination of ground water resulting from leaking landfills had begun to be recognized in the early and mid-1970s, it took a few years before such conditions were given widespread publicity.[56] RCRA started to address this growing concern by

55. Prior to 1970, enforcement of the 1965 Waste Disposal Act had been the responsibility of the United States Public Health Services (USPHS) and the Bureau of Mines (BOM). The USPHS was responsible for municipal waste and BOM supervised mining and fossil fuel waste from power plants and industrial steam plants. When EPA was created, the activities were combined and the responsibilities of overseeing solid waste management activities transferred to EPA. Melosi, *supra*, at 201.

56. Blumberg & Gottlieb, *supra*, at 130.

requiring the EPA to develop criteria for classifying open dumps and sanitary landfills, which during the next two decades ultimately led to the closure of thousands of unlined dumps throughout the country, RCRA, at §6945.

Modern environmental awareness, better scientific capacity to identify threats to public health, and technical innovation have eliminated any complacency about the consequences of disposal that rural communities, such as Madison County might have once enjoyed. While traditional sanitation concerns arose in the nation's cities, with immediate danger from disease and congestion, the modern era has revealed the threat posed to air and groundwater by solid waste in every region. The response to these threats in rural communities, like their urban neighbors, must still come from local government. Technical and organizational advances now make it possible to build safer, although far more expensive, facilities to recycle, compost and landfill solid waste, as Madison County has done. In Madison County, as in New York City and other large population centers, public participation remains extremely important, as local governments strive to implement waste systems that reflect the environmental standards demanded by the public. Today, governmental accountability for the state of waste management is as vital as ever. Therefore, it is important that the court affirm the decision of the Second Circuit, in order to confirm that local government can continue to provide the traditional leadership it has always provided in the field.

Amicus curiae Madison County, in response to concerns from county residents and businesses that were seeing their local dumps shutting down, addressed this need for improved environmental infrastructure by developing a county-owned and operated solid waste management system in the mid 1970's. It included four solid waste transfer stations, recycling drop-off facilities, and a central landfill for use by county residents, businesses and haulers. Madison County has continued to expand and upgrade these solid waste management facilities

over the years, ever mindful of the importance of providing economical and environmentally sound solid waste management services for the community.

Soaring energy prices in the late 1970's and early 1980's, along with RCRA's emphasis on resource recovery, also helped spur the development of waste-to-energy facilities in many communities as a solution to the garbage crisis. These waste-to-energy projects were typically implemented through public-private partnerships. Under such partnerships the local government typically paid a negotiated service fee to the waste-to-energy facility owner/operator covering debt repayments and the cost of disposal. In return, the private owner/operator guaranteed to operate the facility at specified performance levels and share the energy revenues through a negotiated formula.[57]

New York State encouraged the development of waste-to-energy projects by providing grant assistance from a 1976 Environmental Quality Bond Act and by establishing more flexible public procurement rules (NYS General Municipal Law Section 120-ww, adopted in 1980) that facilitated the negotiation of more complex development contracts that were involved with such public-private partnership arrangements.

In 1980 Congress adopted the Comprehensive Environmental Response, Compensation and Recovery Act (CERCLA, also known as Superfund, 42 U.S.C. §9601 *et seq*). CERCLA established a funding mechanism and environmental standards that authorized EPA to take action to clean up abandoned or uncontrolled hazardous waste sites that pose a threat to public health or the environment. CERCLA also imposed strict liability upon those deemed responsible for the release of hazardous substances from such sites. A portion of this clean-up liability even extended to municipalities, businesses, haulers and waste generators who had only sent non-hazardous waste to what eventually became identified as a Superfund site. CERCLA made it clear that the consequences

57. *Id.*, at 38.

of improper waste disposal could be severe — to public health, to the environment and to the financial balance sheet.

In New York State, the Solid Waste Management Act of 1988 (1988 Act) established requirements for local government planning units to prepare long term (a minimum ten-year planning period) solid waste management plans that would be consistent with a state-wide solid waste management hierarchy consisting of the following priorities: 1st—waste reduction, 2nd —recycling, 3rd—recovery of energy from waste and 4th— landfill disposal. The 1988 Act also required municipalities to adopt local laws or ordinances to mandate that recyclable materials be separated from waste, thereby spurring a substantial increase in recycling within New York State that continues to this day.

Madison County, like OHSWMA and other local government planning units throughout New York State, prepared a comprehensive long term solid waste management plan in accordance with the 1988 Act. The County's development of this long term plan not only involved considerable input from the community, including local haulers and recycling companies, but culminated with review and approval by the County's elected Board of Supervisors and by the New York State Department of Environmental Conservation. The County's long term plan calls for the county to continue to provide an environmentally sound, integrated system of solid waste management facilities for county residents, businesses and haulers that emphasizes waste reduction and recycling.

Today, like Respondent, Madison County provides a full array of recycling, waste reduction, household, hazardous waste, transfer, and landfill disposal services to its constituents. These services are paid for by system user (tipping) fees on waste, with no fees charged for recycling, thereby providing incentives to recycle more and to generate less waste for disposal. Within months of the Second Circuit's decision below, in 2001 Madison County also adopted a local flow control law that is substantially

similar to Respondent's, which enables it to secure waste disposal fees that are adequate to support its environmentally beneficial recycling and waste reduction programs, disposal of household hazardous waste, sharps, television and computer recycling, public education, and other programs.

In addition, the County currently has a permit application pending with the New York State Department of Environmental Conservation for a landfill expansion that is anticipated to provide environmentally sound solid waste disposal capacity for over one hundred years. Flow control assures steady tipping fee revenues which are critical to Madison County's environmentally sound solid waste management programs.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

JEFFREY B. MORRIS
Counsel of Record
TOURO LAW SCHOOL
300 Nassau Road
Huntington, NY 11743
(718) 428-3507

S. JOHN CAMPANIE
County Attorney
Madison County
North Court Street
P.O. Box 635
Wampsville, NY 13163

MICHEL J. DEBOTTIS
Madison County
Solid Waste and Recycling
Committee Chairman
230 Main Street
Oneida, NY 13421

Counsel for Amicus Curiae

888C

No. 05-1345

IN THE

Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., *et al.*,
Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE
MANAGEMENT AUTHORITY, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

RICHARD H. SEAMON
UNIVERSITY OF IDAHO
COLLEGE OF LAW
6th & Rayburn
P.O. Box 442321
Moscow, ID 83844
(208) 885-7061

RICHARD RUDA*
Chief Counsel
STATE AND LOCAL LEGAL
CENTER
444 North Capitol Street, N.W.
Suite 309
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the
Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the dormant Commerce Clause forbids a local government from requiring its citizens to have their trash hauled to facilities that the local government itself owns.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
THE DORMANT COMMERCE CLAUSE DOES NOT FORBID A LOCAL GOVERNMENT FROM REQUIRING ITS CITIZENS TO HAVE THEIR TRASH HAULED TO A FACILITY THAT THE LOCAL GOVERNMENT ITSELF OWNS	4
I. A Local Government Acts As A Market Participant When It Sells Waste Management Services To Its Citizens	5
II. A Local Government May, Consistent With The Dormant Commerce Clause, Impose On Its Residents Regulatory Burdens That Are Essential To Providing Public Services Through Market Participation	10
III. Flow Control Ordinances Fall Within The Regulatory Burdens That A Local Government Can, Consistent With The Dormant Commerce Clause, Impose On Its Citizens As An Integral Part Of A Program For Providing Them With Waste Management Services Produced By Publicly Owned Facilities	15
IV. Petitioners' Market Participant Argument Does Not Fit The Facts Of This Case And Misreads This Court's Market Participant Decisions	19
CONCLUSION	22

TABLE OF AUTHORITIES

Cases	Page
Alexandria Scrap Corp. v. Hughes, 391 F. Supp. 46 (D. Md. 1975), *rev'd*, 426 U.S. 794 (1976)..	13
Atkin v. Kansas, 191 U.S. 207 (1903)	7
Automated Salvage Transp., Inc. v. Wheelabrator Envntl. Sys., Inc., 155 F.3d 59 (2d Cir. 1998) ...	9
C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994)	16
Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997).....6, 10, 14	
Chemical Waste Mgmt., Inc. v. Hunt, 504 U.S. 334 (1992).....	8
City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).....	8
College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999)	5
Dows v. City of Chicago, 78 U.S. (11 Wall.) 108 (1871).....	16
GSW, Inc. v. Long County, 999 F. 2d 1508 (11th Cir. 1993).....	9
Heim v. McCall, 239 U.S. 175 (1915).....	7
Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976).....	*passim*
Huish Detergents, Inc. v. Warren County, 214 F.3d 707 (6th Cir. 2000)	9
Incorporated Village of Rockville Centre v. Town of Hempstead, 196 F.3d 395 (2d Cir. 1999).....	9
National Solid Waste Mgmt. Ass'n v. Williams, 146 F.3d 595 (8th Cir.), *cert. denied*, 525 U.S. 1012 (1998).....	9
New Energy Co. v. Limbach, 486 U.S. 269 (1988).....	6
New York v. United States, 326 U.S. 572 (1946)...	12

TABLE OF AUTHORITIES—Continued

	Page
Oregon Waste Sys., Inc. v. Dept. of Envtl. Quality, 511 U.S. 93 (1994)	6, 8
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)	19
Reeves, Inc. v. Stake, 447 U.S. 429 (1980)	*passim*
Sal Tinnerello & Sons, Inc. v. Town of Stonington, 141 F.3d 46 (2d Cir.), *cert. denied*, 525 U.S. 923 (1998)	9, 17
South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984)	14, 18, 21, 22
Southern Waste Sys., Inc. v. City of Delray Beach, 420 F.3d 1288 (11th Cir. 2005)	16
SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 516 U.S. 1112 (1996)	9
Swin Res. Sys., Inc. v. Lycoming County, 883 F.2d 245 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990)	9, 11
U & I Sanitation v. City of Columbus, 205 F.3d 1063 (8th Cir. 2000)	10
United Bldg. & Constr. Trades Council v. Mayor & Council of Camden, 465 U.S. 208 (1984)	7
USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272 (2d Cir. 1995), *cert. denied*, 517 U.S. 1135, 1150 (1996)	9, 12, 16, 17
White v. Mass. Council of Constr. Employers, Inc., 460 U.S. 204 (1983)	14, 15

Statute and Rules

Rules of the U.S. Supreme Court	
Rule 37.3	1
Rule 37.6	1
N.Y. Pub. Auth. L. § 2049-ee (McKinney 1995)	10

TABLE OF AUTHORITIES—Continued

Other Authorities — Page

National Association of Counties, "Environment, Energy & Land Use," in *The American County Platform and Resolutions* (2006)..... 1

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] Because waste management poses a great challenge to state and local governments and their citizens, *amici* have a compelling interest in this case. The challenge is to devise waste management programs that comply with all local, state, and federal requirements; make efficient use of public funds and other public resources; and, most importantly, protect the safety and health of their citizens.

To meet this challenge, many States authorize local governments to enact flow control ordinances as one element of comprehensive waste management schemes. As explained in the official policy of *amicus* National Association of Counties, for example: "Flow control authority gives counties the option to protect themselves and their citizens from Superfund liability at older landfills which may not be environmentally protective, and to overcome the incentive to utilize cheaper, less environmentally-sound landfills. The option to exercise flow control authority also allows states and local governments to create and sustain in-state waste disposal capacity, thereby moderating some of the pressures to export waste to other states." National Association of Counties, "Environment, Energy & Land Use," in *The American County Platform and Resolutions* (2006) at p. 10, available at http://www.naco.org/ContentManagement/ContentDisplay.cfm?ContentID=21816.

---

[1] Pursuant to this Court's Rule 37.3(a), the parties have consented to the filing of this brief and have filed letters of consent with the Court. Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Because of the importance to *amici* and their members of preserving the option to use flow control laws as an essential component of comprehensive waste management schemes such as that of respondents, *amici* submit this brief to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

We agree with respondents that the Second Circuit correctly analyzed and rejected petitioners' dormant Commerce Clause challenge to the flow control ordinances at issue here. Pet. App. 1a-21a (second panel opinion); *id.* at 22a-53a (first panel opinion). In this brief, we offer an alternate route to the same conclusion. Our approach reflects that respondent Oneida-Herkimer Solid Waste Management Authority (Authority) is acting as a market participant when it supplies integrated waste management services to the residents of Oneida and Herkimer Counties (Counties). *See, e.g., Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

1. The Authority acts as a market participant when it provides waste management services to the Counties' residents. This Court has defined market participation to include the government's sale of publicly produced services, which is what is happening here. The lower federal courts have correctly recognized that the government's operation of publicly owned waste management facilities constitutes market participation.

As a market participant, the Authority can favor the Counties' residents. The Authority does so by accepting at its waste management facilities only waste generated in the Counties. The question is whether, in addition to favoring its residents in the provision of the Authority's waste management services, the Counties can require them to have their waste hauled to the Authority's facilities.

2. That question is answered by a principle that emerges from this Court's market participant cases: Just as the dormant Commerce Clause allows the government to prefer its own citizens in the provision of publicly created benefits, it allows the government to impose on its citizens some concomitant burdens necessary to create and sustain those benefits. For example, the government may tax its citizens to fund "free" or below-market-priced goods and services, such as garbage collection. Although tax laws compelling citizens to fund the public services provided to them do not themselves constitute market participation, they make the government's market participation possible. They also mean that—even when acting as a market participant by providing publicly produced services—the government "has the attributes of both a political entity and a private business." *Reeves, Inc. v.* Stake, 447 U.S. 429, 439 n.12 (1980). These tax laws do not violate the Commerce Clause. Rather, they advance "the essential and patently unobjectionable purpose of state [and local] government—to serve the citizens." *Id.* at 442.

3. The same is true of the flow control ordinances challenged here. They fall within the type of regulatory burdens that a government can impose on its citizens to support and sustain the public services provided to them. As petitioners concede (Pet. Br. 48) and lower courts have held, a local government could "eliminate" the market for waste management services by becoming the exclusive provider of cradle-to-grave waste management services to all its citizens. Such a public monopoly, the financial burden and risk of which is borne by citizen-taxpayers, does not discriminate against interstate commerce or unduly burden it. Nor do the Counties' flow control ordinances.

Like a public monopoly, the flow control ordinances do not discriminate against interstate commerce. Rather, they simply reflect the government favoring itself. Moreover, the challenged ordinances do not unduly burden interstate com-

merce. Indeed, unlike a public monopoly in which the government is the exclusive provider of cradle-to-grave waste management services, the flow control ordinances challenged here do not eliminate the private market. The ordinances thus displace private commercial activity less than would a concededly valid scheme in which the government alone provides the complete range of services.

4. Petitioners' market participant argument does not fit the facts of this case and misreads this Court's market participant decisions. Petitioners argue that a state or local government cannot use its regulatory power to favor its market participation over private competitors. The argument may have some force where regulatory measures support governmental activity that merely mimics private commercial activity and is conducted solely for profit. The argument has no force here, however, because respondents' provision of waste management services advances governmental objectives through means that are rare or nonexistent in the private sector precisely because they are not conducted for profit. Furthermore, this Court's market participant decisions do not support petitioners' contention that a state or local government can never use regulatory power to support its market participation.

ARGUMENT

THE DORMANT COMMERCE CLAUSE DOES NOT FORBID A LOCAL GOVERNMENT FROM REQUIRING ITS CITIZENS TO HAVE THEIR TRASH HAULED TO A FACILITY THAT THE LOCAL GOVERNMENT ITSELF OWNS

As explained in their merits brief, respondents have developed a comprehensive waste management program for the Counties' residents. Under the program the Authority acts as a market participant by selling integrated waste management services to the Counties' residents. The challenged flow

control ordinances are an essential part of that program. Pet. App. 20a; Resp. Br. 1-8.

Analysis of the ordinances is therefore appropriately guided by decisions of this Court recognizing a "market participant exception" to the dormant Commerce Clause. *E.g.*, *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685 (1999) (using this term); *see, e.g.*, *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). Those decisions demonstrate that, just as local governments can give some preference to their residents in the provision of public services, they can impose some concomitant burdens necessary to support the provision of those services. Those burdens can include, but are not limited to, tax laws compelling citizens to fund the public services that a local government provides them. Like such tax laws, the Counties' flow control ordinances neither discriminate against nor unduly burden interstate commerce.

I. A Local Government Acts As A Market Participant When It Sells Waste Management Services To Its Citizens

When a State or local government buys or sells goods or services like a private market actor, its activities are "difficult to assess under traditional Commerce Clause analysis." *Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980). This Court has accordingly developed a distinct, "market participant" doctrine for assessing those activities. *See, e.g.*, *College Sav. Bank*, 527 U.S. at 685. The market participant doctrine provides guidance here, because the challenged flow control ordinances are an essential part of a comprehensive program at the center of which is market participation by a local government entity, the Oneida-Herkimer Solid Waste Management Authority.

The Authority acts as a market participant by providing the Counties' residents with comprehensive waste management services at Authority-owned facilities. To support those services, the Authority charges $78 per ton of non-recyclable material to those who haul the material to its facilities. Private haulers, in turn, pass on that cost to the waste generators. Resp. Br. 7. The Authority's charge for non-recyclable waste supports a range of waste management services. For example, the Authority accepts residential recyclables and household hazardous waste at "[n]o charge." J.A. 283a-284a. Thus, the Authority is in effect selling comprehensive waste management services to its citizens.

This activity closely resembles the activity at issue in *Reeves v. Stake*. *Reeves* involved South Dakota's sale of cement produced by a state-owned cement plant. *See* 447 U.S. at 431-433. The Court held that "South Dakota, as a seller of cement, unquestionably fits the 'market participant' label * * *." *Id.* at 440. The Court observed that, unlike natural resources, cement "is the end product of a complex process whereby a costly physical plant and human labor act on raw materials." *Id.* at 444. So, too, are the Authority's waste management services, the sale of which "unquestionably fits the 'market participant' label." *Id.* at 440.[2]

---

[2] By the same token, the Authority's activity differs from governmental activity that the Court has found not to constitute market participation. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 592-594 (1997) (tax exemption); *New Energy Co. v. Limbach*, 486 U.S. 269, 277-278 (1988) (tax credit); *Oregon Waste Sys., Inc. v. Dept. of Envtl. Quality*, 511 U.S. 93, 106 n.9 (1994) ("[W]e confront a patently discriminatory law that is plainly connected to the regulation of interstate commerce. We therefore have no occasion to decide whether Oregon could validly accomplish its limited cost spreading through the 'market participant' doctrine," said of surcharge imposed on in-state disposal of waste generated out of state that was higher than fee for disposal of waste generated inside the state).

The Authority acts as a market participant even though the objectives underlying respondents' waste management program differ from those of private market participants. Most importantly, neither the Authority nor the Counties are in this for the money. They are in this to protect the health and safety of the Counties' residents. *See* Resp. Br. 1. These objectives distinguish them from private market participants. At the same time, they align them with Maryland, whose subsidy program constituted market participation designed to "us[e] its limited funds to clean up its own environment," *Alexandria Scrap*, 426 U.S. at 814; and with South Dakota, whose preference for citizens in the sale of cement served the "governmental goal" of "generating a supply of a previously scarce product needed for local construction and governmental improvements," *Reeves*, 447 U.S. at 442 n.16; *see also United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 222 (1984) (discussing justifications asserted for city's hiring preference for city residents).

This Court's decisions upholding Maryland's and South Dakota's programs show that the Authority's uniquely governmental objectives do not alter its status as a market participant. To the contrary, the restraint underlying the Court's use of the dormant Commerce Clause to invalidate market participation by state and local governments is based partly on "considerations of state sovereignty [and] the role of each State '"as guardian and trustee for its people"' * * *." *Reeves*, 447 U.S. at 438 (quoting *Heim v. McCall*, 239 U.S. 175, 191 (1915) (quoting *Atkin v. Kansas*, 191 U.S. 207, 222 (1903)) (footnote omitted).

Likewise, the Authority's provision of waste management services qualifies as market participation even though the Authority does things that private waste management companies do not do. As respondents' brief describes, for example, the waste management program includes methods and incentives to reduce waste and to divert maximum

quantities of waste to recycling. Resp. Br. 37-39. Those actions do not enhance the bottom line and are not meant to do so. Indeed, some of the waste management services that are provided by the Authority's facilities yield no revenues, but they generate public benefits. J.A. 376a-377a.

In short, respondents do not behave exactly like private market participants. But neither did Maryland when it paid scrap processors bounties to process abandoned cars titled in Maryland simply to clean up Maryland roadsides. Neither did South Dakota when it sold its cement, not for the highest price that the market would bear, but to its own citizens in preference to others. This Court's decisions recognize that state and local governments may use market participation as a means of creatively addressing their citizens' needs. *See Reeves*, 447 U.S. at 441.

Of particular relevance, this Court has recognized that the market participant doctrine may apply when publicly owned facilities provide waste management services. *Oregon Waste Sys.*, 511 U.S. at 106 n.9 ("We * * * have no occasion to decide whether Oregon could validly accomplish its limited cost spreading through the 'market participant' doctrine."); *see also Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 351 (1992) (Rehnquist, C.J., dissenting) ("Alabama may, under the market participant doctrine, open its own facility catering only to Alabama customers."); *cf. City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 n.6 (1978) (noting in waste case, "We express no opinion about New Jersey's power, consistent with the Commerce Clause, * * * to spend state funds solely on behalf of state residents and businesses") (citing *Alexandria Scrap*, 426 U.S. at 805-810). Accordingly, the lower federal courts have held that a state or local government's provision of waste management services produced by publicly owned facilities constitutes "market

participation."[3] The market participant doctrine is likewise relevant in this case.

---

[3] *Incorporated Village of Rockville Centre v. Town of Hempstead*, 196 F.3d 395, 398-402 (2d Cir. 1999) (town acted as market participant when it entered into and later sought to enforce agreement with villages requiring them to dispose of all their trash at the town's waste management facility, in return for town's agreement to supply villages' disposal needs for twenty years); *Automated Salvage Transp., Inc. v. Wheelabrator Envntl. Sys., Inc.*, 155 F.3d 59, 78-79 (2d Cir. 1998) (state agency acted as market participant by entering into long-term waste disposal contracts with Connecticut municipalities as vendor of waste disposal services provided by agency-owned and operated facilities and in reaching settlement agreement with private haulers to prevent interference with those contracts); *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1288-1292 (2d Cir. 1995) (town acted as market participant when it hired contractor to pick up town's trash and deliver it to publicly owned facility), *cert. denied*, 517 U.S. 1135, 1150 (1996); *Swin Res. Sys., Inc. v. Lycoming County*, 883 F.2d 245, 248-251 (3rd Cir. 1989) (relying on Court's market participant cases to hold that county did not violate dormant Commerce Clause by charging, at county-operated landfill located on site leased from federal government, a higher disposal fee for waste generated outside the local area than for locally generated waste), *cert. denied*, 493 U.S. 1077 (1990); *see also National Solid Waste Mgmt. Ass'n v. Williams*, 146 F.3d 595, 599-600 (8th Cir.) (State acted as market participant in directing local governmental units' purchase of waste management services), *cert. denied*, 525 U.S. 1012 (1998); *Sal Tinnerello & Sons, Inc. v. Town of Stonington*, 141 F.3d 46, 51, 55-56 (2d Cir.) (town acted as market participant when it contracted with private firm to be the exclusive collector of town's waste and to transport it to publicly owned waste management facility), *cert. denied*, 525 U.S. 923 (1998); *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 514-518 (2d Cir. 1995) (town acted as market participant when it bought trash collection and disposal services from one private contractor and, under terms of contract, required trash to be delivered to facility operated by a second contractor), *cert. denied*, 516 U.S. 1112 (1996); *cf. Huish Detergents, Inc. v. Warren County*, 214 F.3d 707, 715-16 (6th Cir. 2000) (holding that market participant doctrine did not apply because "[t]he County was not * * * 'selling' its own processing services" but was instead "effectively forcing all city residents to purchase the processing services directly from [a private franchisee]"); *GSW, Inc. v. Long County*, 999 F.2d 1508, 1511-1516 (11th Cir. 1993) (county did not

Under the doctrine, the Authority may favor the Counties' residents in providing waste management services. *See Camps Newfound/Owatonna*, 520 U.S. at 592-593 ("[A] State acting in its proprietary capacity as a purchaser or seller may 'favor its own citizens over others.'") (quoting *Alexandria Scrap*, 426 U.S. at 810). That happens here. The Authority's facilities do not accept waste (other than recyclables) generated outside the Counties. Pet. App. 25a; *see* N.Y. Pub. Auth. L. § 2049-ee(4) & (7) (McKinney 1995). The question is whether, in addition to favoring its citizens through the provision of waste management services provided by the Authority, the Counties can require their residents to have their waste hauled to the Authority's facilities. This Court's market participant decisions answer "yes" to that question, as discussed below.

II. A Local Government May, Consistent With The Dormant Commerce Clause, Impose On Its Residents Regulatory Burdens That Are Essential To Providing Public Services Through Market Participation

When acting as a market participant, a local government can favor its own residents in providing services produced by publicly owned facilities. Such favoritism does not impermissibly discriminate against interstate commerce or unduly burden it. Moreover, just as the Commerce Clause allows a local government to favor its residents in providing

---

act as market participant when it sought contractually to obligate company to build landfill and accept only waste within 150-mile radius of that site); *but cf. U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1067-1072 (8th Cir. 2000) (striking down as violative of dormant Commerce Clause a city ordinance requiring waste collected in city that was destined for in-state disposal to be delivered to city-owned transfer station; no discussion of market participant exception).

publicly produced services, the Commerce Clause allows the local government to impose on its residents some concomitant burdens to support those services. This principle emerges from the Court's market participant cases.

In *Reeves*, the Court likened market participation by the government that favors citizens to the government's preferential provision of public services such as police and fire protection. *See Reeves*, 447 U.S. at 442 (South Dakota's preference for citizens in the sale of cement was no more "protectionist" than "rules restricting to state residents the enjoyment of * * * [among other services] police and fire protection"); *see also Swin Resource Sys.*, 883 F.2d at 251 n.2 (likening county's local preference in operating its landfill to public school's treating nonresident students differently from resident students).

In each situation, the government is channeling to its citizens benefits that they support through taxes and otherwise. *Reeves*, 447 U.S. at 442 (South Dakota's preference "is 'protectionist' only in the sense that it limits benefits generated by a state program to those who fund the state treasury"); *cf. Alexandria Scrap*, 426 U.S. at 814 (rejecting Equal Protection Clause challenge to preferential provision in Maryland bounty program, holding that it bore a rational relationship "to Maryland's purpose of using its limited funds to clean up its own environment"). In each situation, too, the government's provision of services—whether they be traditional services such as fire and police protection or services usually provided by private market actors—may prevent the services from being provided through the private market.

This government displacement of private market activity occurs whether the government-provided services are paid for through taxes or separate charges. For example, a city may provide residential garbage collection to its citizens. Citizens may pay the city for those garbage collection services through

taxes or by paying periodic bills based on their usage of the services (like a water bill). This is true, furthermore, whether the city's collection of trash is considered a traditional government function or an entry by the government into a market ordinarily served by private actors. *Cf. Reeves*, 447 U.S. at 442 n.16 ("[a] State's project is as much a legitimate governmental activity whether it is traditional, or akin to private enterprise") (quoting *New York v. United States*, 326 U.S. 572, 591 (1946) (Douglas, J., dissenting)). In either event, citizens are steering dollars to the government that might otherwise go to private companies, including out-of-state companies. *See Town of Babylon*, 66 F.3d at 1291-1292 (upholding against Commerce Clause challenge property taxes and user fees that financed town's provision of waste management services through market participation).

Citizens pay taxes under compulsion, of course. The laws exerting that compulsion do not themselves constitute market participation when viewed in isolation. They make the government's provision of services possible, however, and therefore cannot be considered in isolation from that provision of services. The broader point is that, when the government "limits benefits generated by a state program to those who fund the state treasury," *Reeves*, 447 U.S. at 442, that funding may occur through taxes or regulatory measures. Just as the Commerce Clause does not forbid the government from limiting some benefits to its citizens, the Clause does not forbid some measures necessary to support the provision of those benefits.

For example, South Dakota spent $2 million to build its cement plant. *Reeves*, 447 U.S. at 446 n.19. The risk of that investment was "borne by South Dakota taxpayers." *Id.* The taxpayers presumably paid those taxes under compulsion, but the tax laws supporting the plant would not violate the Commerce Clause any more than did the State's policy preferring its citizens in the sale of the cement plant's production.

Similarly, the "limited resources" that Maryland used for the bounty program upheld in *Alexandria Scrap* came from fees that the State charged for issuing certificates of vehicle titles. *See* Brief of Appellees at p. 24 & n.38, *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (No. 74-1607); *see also Alexandria Scrap Corp. v. Hughes*, 391 F. Supp. 46, 63 (D. Md. 1975), *rev'd*, 426 U.S. 794 (1976) (observing that bounty program was supported by "state funds"). Thus the bounty program was supported by regulatory fees that anyone who wanted a certificate of title in Maryland was compelled to pay. The laws imposing those fees did not violate the dormant Commerce Clause any more than did the bounty program itself.

More fundamentally, the fact that the programs upheld in *Reeves* and *Alexandria Scrap* were supported by funds from taxes and regulatory fees did not disqualify South Dakota or Maryland for market participant status. Rather, the use of state funds to support the programs—like the governmental objectives underlying the programs—merely reflect that, even when the government acts as a market participant, it "has the attributes of both a political entity and a private business." *Reeves*, 447 U.S. at 439 n.12. Both the bounty program and state legislation supporting it advanced "the essential and patently unobjectionable purpose of state [and local] government—to serve the citizens." *Reeves*, 447 U.S. at 442; *see Alexandria Scrap*, 391 F. Supp. at 48-54 (describing legislation).

Regulatory burdens besides taxes and fees may, consistently with the Commerce Clause, support the government's provision of services to its citizens. The bounty program upheld in *Alexandria Scrap* effectively regulated transactions between unlicensed suppliers of auto "hulks" and licensed processors of those hulks. *See Alexandria Scrap*, 426 U.S. at 802 (bounty program "gave Maryland processors an advantage over appellee and other non-Maryland processors in the

competition for bounty-eligible hulks from unlicensed processors"). In addition, recipients of the bounty had to comply with a licensing scheme. *See id.* at 799-800 & n.9; *Alexandria Scrap*, 391 F. Supp. at 49-50.

In *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 205-206 & n.1, 209-211 (1983), the Court upheld against Commerce Clause challenge an executive order requiring work forces on city-funded construction projects to consist of at least fifty percent city residents. The Court recognized that the order effectively regulated employment contracts between public contractors and their employees. *See id.* at 211 n.7 (noting, in response to dissent's argument that the order "goes beyond market participation because it regulates employment contracts between public contractors and their employees," that "the mayor's executive order covers a discrete, identifiable class of economic activity in which the city is a major participant" because "[e]veryone affected by the order is, in a substantial if informal sense, 'working for the city'").

The principle that emerges from these decisions is that, just as the Commerce Clause allows a State or local government to prefer its citizens in the provision of services, it allows the government to impose some concomitant regulatory burdens necessary to support those services. True, the Commerce Clause puts some limits on both the benefits and the concomitant burdens. *See Camps Newfound/Owatonna*, 520 U.S. at 594 ("Maine's tax exemption—which sweeps to cover broad swathes of the nonprofit sector—must be viewed as action taken in the State's sovereign capacity rather than a proprietary decision to make an entry into all of the markets in which the exempted charities function."); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93-99 (1984) (opinion of White, J.) (holding that Alaska statute requiring in-state processing of timber sold by the State did not fall within market participant doctrine); *White*, 460 U.S. at 211

n.7 ("[T]here are some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business."). As discussed below, however, the ordinances challenged here fall within those limits.

III. Flow Control Ordinances Fall Within The Regulatory Burdens That A Local Government Can, Consistent With The Dormant Commerce Clause, Impose On Its Citizens As An Integral Part Of A Program For Providing Them With Waste Management Services Produced By Publicly Owned Facilities

Above we established that a local government may not only prefer its residents in providing public services but also impose on them some concomitant regulatory burdens. The question remains whether the particular regulatory burden at issue here—contained in the Counties' flow control ordinances—falls within the scope of regulatory burdens that the Counties can impose as a concomitant of providing waste management services at publicly owned facilities.

The answer is yes. These ordinances are no more discriminatory against interstate commerce (which is to say that they are not at all discriminatory) and no more burdensome (which is to say that they impose no cognizable burden) upon interstate commerce than a tax-supported, cradle-to-grave program of publicly provided waste management services. As petitioners concede, the latter would not violate the dormant Commerce Clause.

Petitioners readily acknowledge that "a municipal government may provide comprehensive waste management services to its citizens as a public service without violating the Commerce Clause." Pet. Br. 48; Pet. App. 6a ("[Petitioners] conceded at oral argument that the Counties could create a

public monopoly encompassing the entire waste management process, thereby displacing private firms altogether, without violating the Commerce Clause.").[4] Petitioners cannot dispute that a local government could support the provision of such a cradle-to-grave waste management program through taxation. *See Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871) ("It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments * * *."); *see also Reeves*, 447 U.S. at 442 (State may "limit[] benefits generated by a state program to those who fund the state treasury and whom the State was created to serve").

In operating such a tax-supported public monopoly, the government could provide the services to its citizens "for free" or for a below-market-rate charge. Citizens would use those services instead of ones provided by private market participants. In a sense, the government would thereby "eliminate" the market for waste management services. *See, e.g., Town of Babylon*, 66 F.3d at 1283. In any event, the government would displace private commerce, including interstate commerce.

As stated, petitioners concede that such a program would comport with the dormant Commerce Clause, and lower court case law confirms this. *See, e.g., Southern Waste Sys., Inc. v. City of Delray Beach*, 420 F.3d 1288, 1291 (11th Cir. 2005) (upholding city ordinance and contract awarding exclusive right to private firm to provide waste collection services to its residents, stating, "The Commerce Clause * * * does not forbid exclusive franchise agreements whereby a city selects

---

[4] *See also* Transcript of Oral Argument, *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) (No. 92-1402), 1993 U.S. Trans LEXIS 116, at *7 (counsel for petitioners seemingly answering yes to Chief Justice's question whether "individual municipalities can operate monopoly trash disposal" without violating Commerce Clause).

one waste hauler to provide basic waste collection services to its citizens, so long as the bidding process is open to all, and there is no requirement that local interests be favored in the performance of the contract."); *Town of Babylon*, 66 F.3d at 1282-1288 (rejecting Commerce Clause challenge to "the Town's decision to replace the private market for commercial garbage collection with uniform municipal collection"). Yet petitioners cannot identify any way in which the actual waste management program that respondents have developed—of which the challenged flow control ordinances are an essential part, *see* Pet. App. 20a—is any more discriminatory against or burdensome to interstate commerce than a tax-supported, public program of "free" cradle-to-grave waste management services.

Indeed, whether the government displaces private commerce through tax-supported or fee-supported provision of services, it is just as effectively preventing the services from being provided through the private market. In either case, the government is not discriminating against interstate commerce but instead is simply favoring itself as a supplier of services over the private market. *See Sal Tinnerello*, 141 F.3d at 56 (town did not discriminate against interstate commerce by requiring that waste generators "buy collection or disposal services solely from the Town"); *cf. Town of Babylon*, 66 F.3d at 1283-1286. In either case the government favors itself to fulfill "the essential and patently unobjectionable purpose of state government—to serve the citizens of the State." *Reeves*, 447 U.S. at 442. Accordingly, a local government's decision whether to finance its provision of services by compulsory taxes or by requiring citizens to use (and pay for) those services is not a decision that the Commerce Clause constrains.

The ordinances challenged here are part of a waste management program that displaces private commercial activity less than would a concededly valid scheme in which the

government alone provides cradle-to-grave services. Respondents provide disposal and recycling services. Waste collection is provided by cities, towns, and villages in the two-county region and by private waste haulers such as petitioners. Resp. Br. 2. Private hauling could be replaced by a public system, in which all garbage generated in the counties would be collected by public employees driving publicly owned garbage trucks to haul that garbage to the publicly owned waste management facilities.

Given petitioners' acknowledgement that such a public monopoly would be valid, it is hard to see how a Commerce Clause violation can arise when private firms furnish one segment of the waste service. A local government need not monopolize the whole waste stream to stay within Commerce Clause bounds. *Cf. Reeves*, 447 U.S. at 445 (rejecting argument against South Dakota policy preferring citizens in sale of state-produced cement because the argument "would tolerate even a greater measure of protectionism and stifling of interstate commerce than the challenged system allows").

Our point is that neither the purpose nor effect of respondents' program on interstate commerce can be distinguished from a plainly permissible program of "free," tax-supported waste management services provided by publicly owned facilities. Thus, we do not argue that the flow control ordinances "may be upheld against Commerce Clause challenge on the ground that the State could achieve the same end as a market participant." *Wunnicke*, 467 U.S. at 98-99 (plurality opinion). To the contrary, we recognize that the dormant Commerce Clause could bar some regulatory measures that required a state or local government's citizens to use publicly provided goods or services rather than those available through the private market.

For example, we doubt that a State could require its citizens to buy cement produced by the state-owned cement plant. *Cf.* Pet. Br. 35. Such a requirement would not

discriminate against interstate commerce, because it would merely reflect the State's desire to favor itself. Still, the requirement would impose burdens on interstate commerce that would be undue in light of its local benefits. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The requirement thus could violate the Commerce Clause even though a municipality can validly provide its citizens with free cement produced at publicly owned facilities with local tax dollars.

On the other hand, some such requirements could have such significant local benefits that they would withstand Commerce Clause challenge despite their effect on interstate commerce. For example, a local government might have compelling reasons for requiring its citizens to buy vaccinations from the local health department instead of from private health care providers. Such reasons could include ensuring the quality of the vaccines, the consistency of their administration, and the completeness and accuracy of record keeping.

The Commerce Clause allows the government to favor its citizens in providing vaccine services, which generate public benefits as well as individual benefits, and the Commerce Clause also allows the government to impose some concomitant regulatory burdens necessary to providing those services. The same is true of the comprehensive waste management services provided by respondents, and the flow control ordinances necessary to support those services.

IV. Petitioners' Market Participant Argument Does Not Fit The Facts Of This Case And Misreads This Court's Market Participant Decisions

Petitioners argue (Pet. Br. 34) that a state or local government cannot use its regulatory power to favor its market participation over private competitors. The argument may

have some force where regulatory measures support governmental activity that merely mimics private commercial activity and is conducted solely for profit. The argument has no force here, however, because respondents' provision of waste management services advances governmental objectives through means that are rare or nonexistent in the private sector precisely because they are not designed to turn a profit. *See* Resp. Br. 6-8, 37-39. Furthermore, this Court's market participant decisions do not support petitioners' contention that a state or local government can never use regulatory power to support its market participation.

The challenged flow control ordinances are not designed to support governmental activity that merely replicates that of private market actors or to turn a profit. To the contrary, respondents' waste management program is designed to advance the uniquely governmental objectives of protecting the health and safety of the Counties' residents and minimizing the amount of waste disposed of in landfills. Resp. Br. 1, 6. The program achieves these objectives through incentives and waste management methods that—precisely because they further distinctly governmental objectives—are difficult or impossible to obtain in the private market. *Id.* at 38-40.

Thus, respondents, like the governmental actors in *Alexandria Scrap*, *Reeves*, and *White*, participate in the market to achieve governmental objectives—rather than entrepreneurial ones—and accordingly behave in ways (e.g., preferring their citizens) that private market actors do not.

Indeed, the government may enter the market precisely because the existing private participants are not adequately serving its citizens' needs. For example, "the very reason" South Dakota built its own cement plant "was because the free market had failed adequately to supply the region with cement." *Reeves*, 447 U.S. at 445-446. Maryland entered the market for auto hulks because the private market left too

many abandoned vehicles on Maryland roadsides. *See Alexandria Scrap*, 426 U.S. at 796-797 (describing "bottle-necks in the 'scrap cycle'").

So, too, here, the Counties developed a comprehensive waste management plan, including publicly-owned facilities supported by flow control, because the private market was not working. Among other problems, reliance on the private market exposed local businesses to massive litigation and costs associated with clean-up and remediation under state and federal laws. Resp. Br. 3-4.

In entering the market, the government does not entirely leave behind its governmental identity. *See Reeves*, 447 U.S. at 439 n.12. Not only may the government participate in the market to achieve governmental objectives, as discussed above at pp. 12-15, it may use some regulatory means to support its market participation.

Petitioners' contrary argument misreads this Court's case law. For example, petitioners quote in isolation the statement in *Reeves* that South Dakota had not "restricted the ability of private firms or sister States to set up plants within its borders." 447 U.S. at 444 (quoted in Pet. Br. 34). This language, however, was part of the Court's broader point that South Dakota was not restricting access to the natural resources of which cement is made. *See Reeves*, 447 U.S. at 444. In this way, the Court distinguished *Reeves* from cases in which States sought to hoard their natural resources. *See id.* at 443-444. The Court was not addressing the government's use of regulatory power to facilitate its market participation. Furthermore, similar to South Dakota in *Reeves*, respondents do not restrict the ability of private waste management firms to locate within their borders. Thus, *Reeves* does not support petitioners' argument.

Petitioners' reliance on *Wunnicke* (Pet. Br. 35) is likewise misplaced. *Wunnicke* did not address the government's use of regulatory power to support its market participation. In

Wunnicke, the Court held that Congress had not authorized Alaska's requirement that the purchasers of its timber have the timber processed in Alaska. *See* 467 U.S. at 84-85 & n.2. A plurality of the Court also determined that the requirement could not be upheld under the market participant doctrine. *See id.* at 93-99 (plurality opinion).

In its market participant analysis, the *Wunnicke* plurality did not treat the in-state processing requirement as a regulation but as essentially a contractual condition that Alaska, as the seller of the timber, imposed on those who bought it. *See* 467 U.S. at 97 (plurality opinion) ("[T]he [market participant] doctrine * * * does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity.") The plurality faulted the condition's "substantial regulatory *effect*." *Id.* at 97 (emphasis added). Thus, the *Wunnicke* plurality opinion did not analyze the use of regulation in conjunction with market participation; rather, it addressed the use of market participation to achieve a regulatory result. For that reason, it, like *Reeves*, does not support petitioners' argument.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

RICHARD H. SEAMON
UNIVERSITY OF IDAHO
COLLEGE OF LAW
6th & Rayburn
P.O. Box 442321
Moscow, ID 83844
(208) 885-7061

RICHARD RUDA*
Chief Counsel
STATE AND LOCAL LEGAL
CENTER
444 North Capitol Street, N.W.
Suite 309
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the
Amici Curiae

December 7, 2006

644

No. 05-1345

FILED
NOV 1 3 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., and INGERSOLL PICKUP INC.,

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, and COUNTY OF HERKIMER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, AMERICAN TRUCKING ASSOCIATIONS, INC., AND NATIONAL ASSOCIATION OF MANUFACTURERS

ROBERT DIGGES
Deputy General Counsel
American Trucking Associations, Inc.
2200 Mill Road
Alexandria, Virginia 22314
(703) 838-1700

Counsel for American Trucking Associations, Inc.

DAVID BIDERMAN *
General Counsel
National Solid Wastes Management Association
4301 Connecticut Avenue, N.W.
Washington, D.C. 20008
(202) 364-3743

Counsel for National Solid Wastes Management Association

* Counsel of Record

[*Additional counsel listed on inside cover*]

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D.C. 20001

JAN S. AMUNDSON
Senior Vice President &
General Counsel
QUENTIN RIEGEL
Vice President, Litigation &
Deputy General Counsel
National Association of Manufacturers
1331 Pennsylvania Avenue, NW
Washington, DC 20004-1790
(202) 637-3000

Counsel for National Association
of Manufacturers

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. THE SECOND CIRCUIT'S INTERPRETATION OF *CARBONE* AND THE DORMANT COMMERCE CLAUSE IS FUNDAMENTALLY FLAWED	9
II. CREATING A PUBLIC OWNERSHIP DISTINCTION COULD FUNDAMENTALLY ALTER THE CURRENT EFFICIENT AND ENVIRONMENTALLY PROTECTIVE INTERSTATE DISPOSAL SYSTEM	12
III. THE SECOND CIRCUIT'S EMPHASIS ON FACILITY OWNERSHIP IS AT ODDS WITH MODERN BUSINESS REALITIES AND THIS COURT'S CURRENT COMMERCE CLAUSE JURISPRUDENCE	18
IV. WASTE DISPOSAL IS NOT SOLELY A MUNICIPAL FUNCTION	22
V. THE ASSERTED BENEFITS OF FLOW CONTROL ARE ILLUSORY AND CAN BE ACHIEVED BY ALTERNATIVE MEANS	23
CONCLUSION	26

TABLE OF AUTHORITIES

CASES Page

Am. Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987) 8, 19, 20
Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders, 112 F.3d 652 (3d Cir. 1997) 11
Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders, 48 F.3d 701 (1995), *reh'g and reh'g en banc denied*, 1995 U.S. App. LEXIS 6454 (3d Cir. Mar. 28, 1995) 6, 11
C&A Carbone v. Clarkstown, 511 U.S. 383 (1994) ..... *passim*
Chemical Waste Mgmt., Inc. v. Hunt, 504 U.S. 334 (1992) 10
City of Paterson v. Passaic County Bd. of Chosen Freeholders, 753 A.2d 661 (N.J. 2000) 6
Coastal Carting Ltd. v. Broward County, 75 F. Supp. 2d 1350 (S.D. Fla. 1999) 6
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 1977) 8, 19
Condon v. Andino, Inc., 961 F. Supp. 323 (D. Me. 1997) 6
Connecticut Carting Co. v. Town of East Lyme, 946 F. Supp. 152 (D. Conn. 1996) 11
Fort Gratiot Landfill v. Michigan Dept. of Natural Resources, 504 U.S. 353 (1992) 9
H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949) 9
Harvey & Harvey, Inc. v. County of Chester, 68 F.3d 788 (3d Cir. 1995), *cert. denied*, 516 U.S. 1173 1996) 10
Heier's Trucking, Inc. v. Waupaca County, 569 N.W.2d 352 (Wis. Ct. App. 1997) 6

TABLE OF AUTHORITIES—Continued

Page

Huish Detergents, Inc. v. Warren County, 214 F.3d 707 (6th Cir. 2000) 6

IESI AR Corp. v. Northwest Ark. Regional Solid Waste Mgmt. Dist., 433 F.3d 600 (8th Cir. 2006) 25

Lebanon Farms Disposal, Inc. v. County of Lebanon, No. 03-00682, 2006 WL 1876622 (M.D. Pa. July 5, 2006) 7, 11, 25

National Solid Waste Mgmt. Ass'n v. Daviess County, 434 F.3d 898 (6th Cir. 2006) 6, 7, 11

National Solid Waste Mgmt. Ass'n v. Pine Belt Regional Solid Waste Mgmt. Auth., 389 F.3d 491 (5th Cir. 2004) 6

National Solid Waste Mgmt. Ass'n v. Pine Belt Regional Solid Waste Mgmt. Auth., 261 F.Supp.2d 644 (S.D. Miss. 2003) 6, 11

On The Green Apartments L.L.C. v. City of Tacoma, 241 F.3d 1235 (9th Cir. 2001) 25

Oregon Waste Sys., Inc. v. Dept. of Environmental Quality, 511 U.S. 93 (1994) 9

Philadelphia v. New Jersey, 437 U.S. 617 (1978). 9, 10

Pine Ridge Recycling v. Butts County, 855 F. Supp. 1264 (M.D. Ga. 1994) 12

Randy's Sanitation, Inc. v. Wright County, 65 F. Supp. 2d 1017 (D. Minn. 1999) 6

Southcentral Pa. Waste Haulers Ass'n v. Bedford-Fulton-Huntington Solid Waste Auth., 877 F. Supp. 935 (M.D. Pa. 1994) 11

U & I Sanitation v. City of Columbus, 205 F.3d 1063 (8th Cir.), *reh'g and reh'g en banc denied*, 2000 U.S. App. LEXIS 5173 (8th Cir. Mar. 24, 2000) 6, 10, 15, 25

Waste Mgmt. of Carolinas, Inc. v. New Hanover Cty., No. 93-113 (E.D.N.C. Feb. 21, 2003) 6

TABLE OF AUTHORITIES—Continued

	Page
Waste Mgmt., Inc. v. Metro. Gov't, 130 F.3d 731 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998)	6
Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth., 814 F. Supp. 1566 (M.D. Ala. 1993), *aff'd mem.*, 29 F.3d 641 (11th Cir. 1994)	6
Zenith/Kremer Waste Sys., Inc. v. Western Lake Superior Sanitary Dist., No. 5-95-228, 1996 WL 612465 (D. Minn. July 2, 1996)	11
STATUTES AND REGULATIONS	
42 U.S.C. § 6901 *et seq.*	12
42 U.S.C. § 9607(p)	24
40 C.F.R. §§ 60.30c-36c	22
40 C.F.R. §§ 60.750-759	22
40 C.F.R. §§ 62.14350-14356	22
40 C.F.R. §§ 63.1930-1990	22
40 C.F.R. Part 258	12, 22
U.C.C. § 9-202 (2000)	19
LEGISLATIVE MATERIALS	
House Hearings, Bills & Resolutions	
Municipal Solid Waste Flow Control Act of 2001, H.R. 1214, 107th Cong. § 2 (2001)	5
Solid Waste Interstate Transportation Act of 2001, H.R. 1213, 107th Cong. § 2 (2001)	5
Solid Waste Interstate Transportation and Local Authority Act of 1999, H.R. 1190, 106th Cong. § 3 (1999)	5
Municipal Solid Waste Flow Control Act of 1997, H.R. 943, 105th Cong. § 2 (1997)	5
H.R. Res. 349, 104th Cong. § 2 (1996)	5

TABLE OF AUTHORITIES—Continued

Page

State and Local Government Interstate Waste Control Act of 1995, H.R. 2323, 104th Cong. (1995) 5
Local Governments Flow Control Act of 1995, H.R. 1085, 104th Cong. § 2 (1995) 5
Public Debt Relief Act of 1995, H.R. 2838, 104th Cong. § 2 (1995) 5
Flow Control Act of 1994, H.R. 4683, 103d Cong. § 1 (1994) 5

Senate Hearings & Bills

Solid Waste Interstate Transportation and Local Authority Act of 2001, S. 1194, 107th Cong. § 3 (2001) 5
Interstate Transportation of Municipal Waste and Flow Control: Hearing on S. 533, S. 663 and S. 872 Before the Senate Comm. On Environment and Public Works, 106th Cong. (1999) 5
Municipal Solid Waste Interstate Transportation and Local Authority Act of 1999, S. 872, 106th Cong. § 5 (1999) 5
Solid Waste Interstate Transportation and Local Authority Act of 1999, S. 663, 106th Cong. § 3 (1999) 5
Transportation and Flow Control of Solid Waste: Hearing Before the Senate Comm. On Environment and Public Works, 105th Cong. (1997) .. 5
Municipal Solid Waste Flow Control Act of 1995, S. 534, 104th Cong. § 202 (1995) 5
Municipal Waste Flow Control Transition Act of 1995, S. 485, 104th Cong. § 2 (1995) 5
Flow Control Act of 1994, S. 2227, 103d Cong. § 2 (1994) 5

TABLE OF AUTHORITIES—Continued

Page

House & Senate Reports

S. Rep. No. 104-52 (1995) 4
H.R. Rep. No. 103-738 (1994) 5
S. Rep. No. 103-322 (1994) 5

MISCELLANEOUS

Biocycle, *The State of Garbage in America*, (April 2006) 12
Chartwell Information, *The Directory & Atlas of Solid Waste Disposal Facilities 2003* (7th ed. 2003) 7, 18
Department of Sanitation, *Comprehensive Solid Waste Mgmt. Plan* (July 2006) (www.nyc.gov/html/dsny/html/reports/swmp-4oct.shtml) 21
Douglas Brill, *Less Trash Means Less Cash*, Easton Express-Times (Oct 23, 2006) 13
Eric Lipton, *City Trash Follows Long and Winding Road*, N.Y. Times, Mar. 24, 2001 14
Flow Controls and Municipal Solid Waste, EPA Office of Solid Waste, EPA 530-R-95-008 (March 1995) 24
Geoffrey Oberhaus, *The Dormant Commerce Clause Dumps New Jersey's Solid Waste "Flow Control" Regulations: Now What? Possible Constitutional Alternatives to the Current "Flow Control" System*, Vol. 29, No. 2, Rutgers L.J. (1997-98) 23
James E. McCarthy, *CRS Report for Congress: Interstate Shipment of Municipal Solid Waste: 2004 Update* (Sept. 9, 2004) 14, 15
John Turner, *The Flow Control of Solid Waste and the Commerce Clause: Carbone and Its Progeny*, 7 Vill. Env. L. Journal 203 (1996) 9

TABLE OF AUTHORITIES—Continued

	Page
Landfill Methane Outreach Program at www.epa.gov/lmop	13
Largest Landfills, Waste News (Nov. 6, 2006)	23
National Economic Research Associates, *The Cost of Flow Control* (May 3, 1995)	4
Rick Hampson, *Trash Provides 'Horn O' Plenty For Towns*, USA Today (Sept. 29, 2003)	13
U.S. Environmental Protection Agency, Municipal Solid Waste Generation, Recycling, and Disposal in the United States: Facts and Figures for 2003	24
U.S. Environmental Protection Agency, Municipal Solid Waste in the United States: 2005 Facts and Figures	24
U.S. Environmental Protection Agency, Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites (Feb. 5, 1998)	24
U.S. Environmental Protection Agency. Wastes, Solid Waste Landfills	13
Waste News Market Handbook 2005	22

IN THE

Supreme Court of the United States

No. 05-1345

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., and INGERSOLL PICKUP INC.,

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, and COUNTY OF HERKIMER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, AMERICAN TRUCKING ASSOCIATIONS, INC., AND NATIONAL ASSOCIATION OF MANUFACTURERS

INTEREST OF THE *AMICI CURIAE*

The National Solid Wastes Management Association ("NSWMA"), the American Trucking Associations, Inc. (ATA), and the National Association of Manufacturers (NAM) respectfully submit this brief as *amici curiae*.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than *amici curiae* and their members, made

NSWMA is a not-for-profit trade association whose 1700 member companies operate in all fifty states. Collectively, these private sector companies engage in nearly every aspect of solid waste management. NSWMA's members include collectors and transporters of solid waste; operators of solid waste treatment, storage and disposal facilities; waste recyclers; and firms providing legal, financial and consulting services to the waste management industry. NSWMA regularly represents its members in matters before the courts, Congress and regulatory agencies. It filed an *amicus* brief in support of the petitioner in the case of *C&A Carbone v. Clarkstown*, 511 U.S. 383 (1994), in which this Court held that Clarkstown, New York's flow control laws violated the dormant Commerce Clause.

ATA is a nonprofit corporation that serves as the national trade association of the trucking industry. It has over 2,000 direct motor carrier members and, in cooperation with state trucking associations and affiliated national trucking conferences, ATA represents tens of thousands of motor carriers. ATA was created to promote and protect the interests of the trucking industry, which consists of every type and geographical scope of motor carrier operation in the United States, including for-hire carriers, private carriers, leasing companies and others. ATA regularly advocates the trucking industry's position before the United States Supreme Court and other courts. ATA seeks to preserve the interstate market in solid waste and recyclable materials on behalf of the numerous ATA members already engaged in, or planning to become engaged in, the interstate transportation of such materials.

---

a monetary contribution to the preparation or submission of this brief. All parties have consented to this filing in letters on file with the Office of the Clerk of this Court.

The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. NAM's members will be forced to pay increased solid waste disposal costs due to flow control laws if the decision below is not overturned.

The appeals court in this case has issued a strained and idiosyncratic interpretation of this Court's decision in the *Carbone* flow control case. While the overwhelming majority of federal courts that have addressed this issue in the twelve years since *Carbone* have applied a "virtually per se illegal" Commerce Clause standard of review, the federal appeals court below patched together its own unique reading of *Carbone*, and applied a far more lenient balancing test. For the reasons set forth below, and in Petitioners' Brief, this analysis and the resulting decision are legally unsupportable, and, if not reversed, will lead to a resumption of local solid waste disposal monopolies, to the detriment of solid waste haulers, disposal facilities, the communities that host and receive financial benefits from such facilities, long-haul transporters, and importantly, customers/waste generators. Further, the policy arguments for Respondents' flow control ordinances are fundamentally flawed, and there are other mechanisms that Respondents can use to achieve the purported economic and environmental benefits they seek.

Five years ago, NSWMA, ATA, and NAM warned that the Second Circuit's initial decision in this case provided a "blueprint" for local governments to evade their Commerce Clause obligations, and predicted that other localities, includ-

ing local governments outside the Second Circuit, would use this case as an excuse to prevent waste from entering the interstate market. Brief of Amici Curiae National Solid Wastes Management Association, *et al* (No. 01-686) at 6. Unfortunately, this prediction has come true. The past few years have seen a substantial increase in flow control laws and legal challenges to them under the dormant Commerce Clause. In many of these instances, local governments have sought to justify their monopolization of waste flow by citing to the Second Circuit's decisions in this proceeding. Unless reversed by this Court, the decision below threatens to disrupt even further the functioning of the interstate market for solid waste and recycling services.

Prior to this Court's decision in *Carbone*, the balkanization of that market was a major threat to the waste industry and to the businesses that depend on its services. By 1995, over 75% of the states had authorized flow control laws[2] and local governments were rushing to take advantage of the opportunity to ensure the success of their local disposal facilities by preventing the waste generated in the locality from being taken anywhere else. The predictable result was an escalation of prices for solid waste disposal, as protected facilities set their rates without fear of competition. See *The Cost of Flow Control*, National Economic Research Associates at 1-2 (May 3, 1995) (flow control adds about 33 percent to average landfill and transfer station disposal costs). Moreover, a snowball effect was rapidly developing, as other localities were forced to respond by enacting their own flow control laws to protect local facilities which previously had depended on out-of-state waste for their financial viability.

---

[2] S. Rep. No. 104-52, at 5-6 (1995) (as of 1995, thirty-five states, the District of Columbia and the Virgin Islands directly authorized flow control, and an additional four states indirectly authorized it through local solid waste management plans, home rule or other mechanisms).

In *Carbone*, this Court unequivocally held that the challenged flow control ordinance discriminated against interstate commerce and that any "local problems," including health and environmental problems, could be solved by "the unobstructed flow of interstate commerce itself. . . ." 511 U.S. at 393. However, localities with existing flow control laws did not acquiesce gracefully to this Court's decision. In addition to seeking legislation from Congress specifically authorizing flow control laws (which was vigorously opposed by NSWMA),[3] localities sought to perpetuate flow control by attempting to distinguish their particular laws from those struck down in *Carbone* and by making cosmetic changes to their ordinances. Another wave of litigation ensued, and the courts once again became "clogged with cases challenging

---

[3] *See, e.g.*, Solid Waste Interstate Transportation Act of 2001, H.R. 1213, 107th Cong. § 2 (2001); Municipal Solid Waste Flow Control Act of 2001, H.R. 1214, 107th Cong. § 2 (2001); Solid Waste Interstate Transportation and Local Authority Act of 2001, S. 1194, 107th Cong. § 3 (2001); Solid Waste Interstate Transportation and Local Authority Act of 1999, H.R. 1190, 106th Cong. § 3 (1999); Solid Waste Interstate Transportation and Local Authority Act of 1999, S. 663, 106th Cong. § 3 (1999); Municipal Solid Waste Interstate Transportation and Local Authority Act of 1999, S. 872, 106th Cong. § 5 (1999); Municipal Solid Waste Flow Control Act of 1997, H.R. 943, 105th Cong. § 2 (1997); H.R. Res. 349, 104th Cong. § 2 (1996); State and Local Government Interstate Waste Control Act of 1995, H.R. 2323, 104th Cong. (1995); Local Governments Flow Control Act of 1995, H.R. 1085, 104th Cong. § 2 (1995); Public Debt Relief Act of 1995, H.R. 2838, 104th Cong. § 2 (1995); Municipal Waste Flow Control Transition Act of 1995, S. 485, 104th Cong. § 2 (1995); Municipal Solid Waste Flow Control Act of 1995, S. 534, 104th Cong. § 202 (1995); Flow Control Act of 1994, H.R. 4683, 103d Cong. § 1 (1994); Flow Control Act of 1994, S. 2227, 103d Cong. § 2 (1994); *Interstate Transportation of Municipal Waste and Flow Control: Hearing on S. 533, S. 663 and S. 872 Before the Senate Comm. on Environment and Public Works*, 106th Cong. (1999); *Transportation and Flow Control of Solid Waste: Hearing Before the Senate Comm. on Environment and Public Works*, 105th Cong. (1997); S. Rep. No. 103-322 (1994); H.R. Rep. No. 103-738 (1994).

restrictions on waste-related services, making garbage the modern legal battleground over the Commerce Clause." *Huish Detergents, Inc. v. Warren County*, 214 F.3d 707, 713 (6th Cir. 2000). The courts promptly overturned many of these laws,[4] and localities gradually have been brought into compliance with their Commerce Clause obligations.

An affirmance by this Court, based on the meaningless "public-private distinction" invented by the Second Circuit, threatens to undo much that has been accomplished. In response to the Second Circuit's initial 2001 decision in this case, Pet. App. at 22a-53a, local governments throughout the United States have enacted flow control laws that rely on the Second Circuit's novel interpretation of *Carbone* and the dormant Commerce Clause. See *National Solid Waste Mgmt. Ass'n v. Daviess County*, 434 F.3d 898 (6th Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3106 (June 28, 2006) (No. 06-359); *National Solid Waste Mgmt. Ass'n v. Pine Belt Regional Solid Waste Mgmt. Auth.*, 261 F. Supp. 2d 644 (S.D. Miss. 2003), *rev'd in part*, 389 F.3d 491 (5th Cir. 2004), *cert. denied*, 126 S. Ct. 332 (2005); *Waste Mgmt. of Carolinas, Inc. v. New Hanover Cty.*, No. 93-113 (E.D.N.C. Feb. 21, 2003).

---

[4] *See, e.g.*; *Huish Detergents*, 214 F.3d at 715-16; *U & I Sanitation v. City of Columbus*, 205 F.3d 1063 (8th Cir.), *reh'g and reh'g en banc denied*, 2000 U.S. App. LEXIS 5173 (8th Cir. Mar. 24, 2000); *Waste Mgmt., Inc. v. Metro. Gov't*, 130 F.3d 731 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998); *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701, 712 (1995), *reh'g and reh'g en banc denied*, 1995 U.S. App. LEXIS 6454 (3d Cir. Mar. 28, 1995); *Coastal Carting Ltd. v. Broward County*, 75 F. Supp. 2d 1350 (S.D. Fla. 1999); *Randy's Sanitation, Inc. v. Wright County*, 65 F. Supp. 2d 1017 (D. Minn. 1999); *Condon v. Andino, Inc.*, 961 F. Supp. 323 (D. Me. 1997); *Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth.*, 814 F. Supp. 1566 (M.D. Ala. 1993), *aff'd mem.*, 29 F.3d 641 (11th Cir. 1994); *City of Paterson v. Passaic County Bd. of Chosen Freeholders*, 753 A.2d 661 (N.J. 2000); *Heier's Trucking, Inc. v. Waupaca County*, 569 N.W.2d 352 (Wis. Ct. App. 1997).

In the *Daviess County* case, the Sixth Circuit expressly "decline[d] to adopt" the "private-public distinction" created by the Second Circuit in this case. 434 F.3d at 909. Characterizing the Second Circuit's decision as "surprising," *id.* at 910, the Sixth Circuit "respectfully disagree[d] with the Second Circuit on the proposition that *Carbone* lends support for the public-private distinction drawn by that court." *Id.* While the courts have almost universally rejected the Second Circuit's *United Haulers* analysis, this has not deterred some local governments from passing new flow control laws. See, e.g., *Lebanon Farms Disposal, Inc. v. County of Lebanon*, No. 03-00682, 2006 WL 1876622 (M.D. Pa. July 5, 2006) (in-validating 2003 flow control law directing solid waste to government-owned landfill). The continued enactment of anti-competitive flow control laws, which create local waste monopolies immunized from the benefits of free market competition, poses a threat to the solid waste industry, long-haul transporters, the communities that host landfills and others. Overturning the flawed decision below is thus essential to ensure that the interstate trade in solid waste and recyclables, and the important constitutional principles underlying the Commerce Clause, are not thwarted.

SUMMARY OF ARGUMENT

Unless the decision of the court below is promptly reversed, the interstate market in solid waste and recyclables will be seriously disrupted. Over 60 percent of the nation's waste facilities currently are owned by public entities.[5] The Second Circuit's decision, by providing a blueprint for governments to evade *Carbone*, virtually ensures that flow control laws promptly will be re-enacted with respect to many of those facilities, thereby locking millions of tons of waste

---

[5] Chartwell Information, *Directory & Atlas of Solid Waste Disposal Facilities 2003*, Table 2 at vii (7th ed. 2003) (62% of waste facilities are publicly owned).

out of the interstate market. Such effects will not be limited to states in the Second Circuit. Virtually every state in the nation receives waste from other states. Indeed, since the Second Circuit's initial decision in this case, local governments in Kentucky (Daviess County), Mississippi (Pine Belt Solid Waste Management Authority), Pennsylvania (Lebanon County) and elsewhere have adopted flow control laws, some of which rely expressly on the Second Circuit's erroneous interpretation of *Carbone* and the dormant Commerce Clause.

The Second Circuit's decision is at odds with both modern business realities and this Court's current Commerce Clause jurisprudence. By making the constitutionality of a flow control ordinance turn on the ownership of the favored facility, the court below has ignored the practical economic effect of the ordinance—which this Court repeatedly has emphasized is the key determinant when analyzing issues of discrimination against interstate commerce. *Am. Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987) ("*ATA*"); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The effect of flow control on competing out-of-state waste facilities and on the haulers, interstate trucking companies, railroads and barge lines that seek to transport waste to those facilities is the same regardless of whether the favored local facility is privately or publicly owned. The effect also will be felt by the generators who use these facilities. This Court, in *Carbone*, already has concluded that the economic effects of flow control are "interstate in reach," 511 U.S. at 389, and that such laws discriminate against interstate commerce. A difference in the ownership of the facilities favored by a flow control ordinance cannot change that reality.

ARGUMENT

I. THE SECOND CIRCUIT'S INTERPRETATION OF *CARBONE* AND THE DORMANT COMMERCE CLAUSE IS FUNDAMENTALLY FLAWED

The Second Circuit's interpretation and analysis of the Court's decision in *Carbone* and its application of the dormant Commerce Clause are fundamentally flawed. As set forth by Petitioners in their brief, the appeals court's ruling that the *Pike* balancing test applies when a flow control law designates government-owned waste disposal facilities as the recipient of waste is at odds with both well-settled precedent and common sense.

None of this Court's dormant Commerce Clause cases remotely suggests that there is some sort of "public-private distinction" between government-owned and privately-owned facilities. The dormant Commerce Clause's overriding purpose is to prevent states or local governments from placing themselves "in a position of economic isolation." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-38 (1949). As a result, when local governments establish barriers to interstate trade, a "virtually per se rule of invalidity has been erected." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Indeed, the Court has routinely found "parochial legislation of this kind to be constitutionally invalid." *Id.* at 627.[6] The same dormant Commerce Clause analysis was applied by the Court in a series of decisions that struck down efforts by states to discriminate against out-of-state waste. See *Oregon Waste Sys., Inc. v. Dept. of Environmental Quality*, 511 U.S. 93 (1994); *Fort Gratiot Landfill v. Michigan Dept. of Natural*

---

[6] See John Turner, *The Flow Control of Solid Waste and the Commerce Clause: Carbone and Its Progeny*, 7 Vill. Env. L. Journal 203, 260 (1996) ("The Commerce Clause serves an important—indeed, irreplaceable—function as a mandate for economic cooperation and unification.").

Resources, 504 U.S. 353 (1992); *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992); *Philadelphia v. New Jersey*, *supra*.

Since *Carbone* was decided, it has been understood by all parties with a stake in solid waste disposal—including municipalities and counties as well as solid waste facility operators, recyclers and haulers—to apply to privately-owned and publicly-owned facilities alike. This seemed apparent from *Carbone* itself, where the transfer station protected by the flow control ordinance was privately owned at the time of the litigation, but was scheduled to revert to municipal ownership shortly after the Court issued its decision.[7] Yet despite the filing of an amicus brief urging this Court to limit its decision to privately-owned facilities[8] and a vigorous dissent urging that the Clarkstown ordinance be upheld because the "one proprietor so favored is essentially an agent of the municipal government,"[9] the majority opinion did not even hint that the constitutionality of the ordinance might hinge on whether the case was decided before or after Clarkstown exercised its option to purchase the facility.

In the aftermath of *Carbone*, at least three courts of appeals and three district courts invalidated flow control laws where the facility at issue was publicly owned.[10] When New

---

[7] *Carbone*, 511 U.S. at 383. Shortly after the Court issued its decision in *Carbone*, ownership of the transfer station reverted to the Town of Clarkstown.

[8] *See* Brief of *Amicus Curiae* City of Springfield, Missouri at 11-15, *Carbone* (No. 92-1402).

[9] *Carbone*, 511 U.S. at 416 (Souter, J., dissenting). Moreover, the Clarkstown ordinance on its face referred to the designated transfer station as "the Town of Clarkstown solid waste facility. . . ." *Id.* at 396.

[10] *See U & I Sanitation*, 205 F.3d at 1065-66, 1071-72 (city-owned transfer station); *Waste Mgmt.*, 130 F.3d at 733, 736 (publicly owned waste-to-energy facility); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 794 (3d Cir. 1995) (county owned landfills), *cert. denied*, 516 U.S.

Jersey's state-wide flow control system, which favored both privately-owned and government-owned disposal facilities, was declared unconstitutional by the Third Circuit, see *Atlantic Coast Demo. & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701 (3d Cir. 1995), the appeals court did not draw any distinction between those disposal facilities based on who owned them.[11]

Most recently, in *NSWMA v. Daviess County*, the Sixth Circuit expressly declined to follow the Second Circuit's "surprising" interpretation of the *Carbone* decision. 434 F.3d at 909-912. Carefully parsing the language of *Carbone*, it concluded that "[f]or every sentence in the decision that can be interpreted as supporting such a distinction, there is a sentence that can be interpreted in opposition." *Id.* at 910. The Sixth Circuit also found the Second Circuit's interpretation of other dormant Commerce Clause decisions to be "similarly strained." *Id.* at 912. District courts that have had occasion to address the significance of public versus private ownership of waste facilities have similarly concluded that public ownership made no difference.[12]

1173 (1996); *Lebanon Farms*, supra; *Zenith/Kremer Waste Sys., Inc. v. Western Lake Superior Sanitary Dist.*, No. 5-95-228, 1996 WL 612465, at **1-3, 10 n.13 (D. Minn. July 2, 1996) (waste-to-energy facility owned by waste district); *Connecticut Carting Co. v. Town of East Lyme*, 946 F. Supp. 152, 154 (D. Conn. 1996) (publicly owned waste disposal plant).

[11] Many of the facilities favored by New Jersey county flow control laws were government-owned. See *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 112 F.3d 652, 673-82 (3d Cir. 1997) (App.) (identifying specific government-owned disposal facilities designated under New Jersey's flow control laws).

[12] *See National Solid Wastes Mgmt. Ass'n v. Pine Belt Solid Waste Mgmt. Auth*, 261 F.Supp.2d 644 (S.D. Miss. 2003) (rejecting Second Circuit's analysis of *Carbone*), *rev'd on other grounds*, 389 F.3d 491 (5th Cir. 2004); *Southcentral Pa. Waste Haulers Ass'n v. Bedford-Fulton-Huntington Solid Waste Auth.*, 877 F. Supp. 935, 943 (M.D. Pa. 1994)

II. CREATING A PUBLIC OWNERSHIP DISTINCTION COULD FUNDAMENTALLY ALTER THE CURRENT EFFICIENT AND ENVIRONMENTALLY PROTECTIVE INTERSTATE WASTE DISPOSAL SYSTEM

If the public ownership exception to traditional dormant Commerce Clause principles invented by the Second Circuit is affirmed, it could have a dramatic adverse impact on the efficient and environmentally protective interstate waste disposal system that has developed over the past several decades. As a result of tough federal regulations issued under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* (RCRA), many small municipal "dumps" closed.[13] In response, both private industry and local governments developed and opened larger, more environmentally protective sanitary landfills that receive waste from larger geographic "wastesheds." Often, these wastesheds cross state lines. These modern sanitary landfills have sophisticated groundwater monitoring, leachate collection and gas collection and control systems as required under the RCRA Subtitle D regulations, 40 C.F.R. Part 258. The U.S. Environmental Protection Agency (EPA) recognizes that modern landfills are "well-

---

(invalidating a flow control law and stating that the Court was "not persuaded that the public nature of the [designated] facility changes the applicable analysis"). *See also Pine Ridge Recycling v. Butts County*, 855 F. Supp. 1264, 1275 (M.D. Ga. 1994) (finding that local government officials "engineered to prohibit a competitor from entering the waste disposal market" in order to subsidize construction of a new publicly owned landfill, and explaining that "[i]t should make little difference that the [waste authority] owns its [landfill] currently and the facility in *Carbone* would be turned over to the town after five years of private operation. Such a distinction would focus on form and ignore substance") (emphasis added).

[13] The number of landfills in the United States has declined from nearly 8,000 in 1988 to fewer than 1,700 in 2004. Biocycle, *The State of Garbage in America*, (April 2006) at 27.

engineered facilities that are located, designed, operated, and monitored to ensure compliance with federal regulations."[14] At a growing number of landfills, methane emissions are captured and sold to local utilities or end-users, reducing landfills' contribution to greenhouse gases.[15]

The *United Haulers* decision threatens many of these landfills and the economic viability of the communities in which they operate. If local governments continue to enact flow control laws based on *United Haulers*, some of the waste received by these landfills will be forced instead to local, government-owned disposal facilities. Equally important, local governments that host these modern waste disposal facilities and receive a substantial portion of their annual revenue from them could face a major fiscal crisis. Landfills pay "host fees" to the local community as high as $4.50 for each ton received. Rick Hampson, *Trash Provides 'Horn O' Plenty For Towns*, USA Today (Sept. 29, 2003) at 15A. These fees often exceed one million dollars annually. *Id.* In some communities, these proceeds are a significant percentage of the local government's annual revenue. *Id.*[16]

The impact may be greatest in the states that receive substantial quantities of solid waste from other states. As of

---

[14] U.S. Environmental Protection Agency, Wastes, Solid Waste Landfills (last updated Oct. 6, 2006) at www.epa.gov/epaoswer/non-hw/muncpl/landfill/sw_landfill.htm.

[15] See generally Landfill Methane Outreach Program (LMOP) at www.epa.gov/lmop. The EPA estimates that the nearly 400 landfills in its landfill methane program have "prevented the release of nearly 21 million metric tons of carbon equivalent (MMTCE—the basic unit of measure for greenhouse gases) into the atmosphere over the past eleven years." See www.epa.gov/lmop/accomplish.htm. The energy generated by these landfills has also offset the use of 162 million barrels of oil, *id.*, a number that increases daily.

[16] For example, host fees paid by one Pennsylvania landfill comprise 24 percent of the receiving municipalities' budgets. Douglas Brill, *Less Trash Means Less Cash*, Easton Express-Times (Oct. 23, 2006).

2003, ten states received more than one million tons originating in other states. James McCarthy, *CRS Report for Congress: Interstate Shipment of Municipal Solid Waste: 2004 Update* (Sept. 9, 2004) at Table 1. New York alone exported more than 8 million tons of solid waste in 2003, including 3.7 million tons to Pennsylvania, 1.7 million tons to Virginia, 1.6 million tons to New Jersey, 887,000 tons to Ohio, and smaller quantities to Georgia, Massachusetts, Michigan and West Virginia. *Id.* at CRS-21. Host communities in those states which receive and depend on the revenue associated with New York waste are threatened by the very real likelihood that this funding source will be cut off if the public-private distinction invented by the Second Circuit receives this Court's blessing. Nationwide, tens of millions of tons of solid waste are susceptible to immediate "hoarding" by trash-hungry localities—if the decision below is allowed to stand.

Indeed, the entire intricate web of solid waste companies and facilities that provide cost-effective service to residents, businesses and local governments in the Northeast and throughout the United States will be impacted adversely unless the Second Circuit's decision is overturned. Many local and national waste collection companies in the Northeast and elsewhere collect trash and dispose of it at transfer stations owned by private waste companies. These companies, in turn, contract with long-haul trucking companies and railroads to transport trash from the transfer stations to landfills and waste-to-energy plants in other states.[17] In New

---

[17] In New York City alone, more than 250 licensed haulers collect commercial and industrial solid waste. Most of the thousands of tons of New York City solid waste collected daily by these haulers is processed at transfer stations and disposed of at landfills or waste-to-energy plants in New Jersey, Pennsylvania, Virginia, Ohio and other states. *See* Eric Lipton, *City Trash Follows Long and Winding Road*, N.Y. Times, Mar. 24, 2001.

York, numerous waste collectors operating in counties with publicly-owned disposal facilities currently dispose of waste at facilities in other states. If the Court does not overturn the decision below, local governments in those counties will be able to initiate monopolies, or reestablish their pre-*Carbone* monopolies, on solid waste disposal services. This will have immediate adverse consequences for companies that have acquired, constructed or expanded state-of-the-art facilities in other states in reliance on the assumption that they would be able to compete freely in the interstate market for the solid waste needed to operate these facilities efficiently. The Second Circuit's decision similarly threatens the interstate market in recyclables, as flow control measures often encompass recyclable materials in addition to solid waste.[18] Flow control measures restricting delivery of recyclables to local, publicly owned facilities to the detriment of competing out-of-state facilities will seriously disrupt the interstate market for recyclables and the industries that depend on that market.[19]

Counties and municipalities in states that receive out-of-State waste can hardly be expected to stand idly by if local governments in exporting states take advantage of a newfound ability to hoard waste for their publicly-owned facilities. In Pennsylvania, for example, which received more than 3.7 million tons of waste from New York in 2003,[20] or in other states, a loss of waste originating in New York will undoubtedly lead to flow control laws as local governments act to hoard all of their own "homegrown" product. The resulting spiral of protectionist legislation is precisely the

---

[18] In the case at bar, the local flow control ordinances apply to both solid waste and recyclables. Pet. App. at 4a-5a.

[19] *See, e.g., U & I Sanitation*, 205 F.3d at 1069 (discussing the interstate effect of flow control on the recyclables market).

[20] *CRS Report* at CRS-21.

profound harm that *Carbone* (and the Commerce Clause more generally) was intended to halt. *See Carbone*, 511 U.S. at 390 ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent").

Nor would the effects of the public-private distinction be limited to those facilities that are publicly owned at this moment in time. New facilities will undoubtedly be structured so as to incorporate public ownership. For example, it would have been a simple matter for Clarkstown to have assumed ownership of the transfer station at the outset (subject to a security interest) while contractually promising the entity that constructed and managed it the right to receive all tipping fees for five years. Under the decision below, it then could have used flow control to ensure that the private company's investment was recouped within those five years. Moreover, there is nothing to prevent a county or municipality that is currently providing financial support to a privately owned facility (as Clarkstown did in *Carbone*) from restructuring its relationship with the private company so as to vest ownership in a public body—and thereby make itself eligible for flow control. Under the Second Circuit's novel decision, there is no requirement that a waste facility be publicly owned from the outset. Presumably a formerly private facility converted to a publicly-owned facility would be entitled to the benefit of flow control laws once the conversion had been accomplished.[21] Nor does the Second Circuit's decision require the city or county itself to become the owner of the facility. Indeed, in this case the two counties

---

[21] Under the Second Circuit's rationale, it would appear that even Clarkstown, New York—whose flow control ordinance was declared unconstitutional by this Court in *Carbone*—could argue that its ordinance is now constitutional because it now owns the facility.

involved created a "waste management authority" to acquire ownership of the facilities.[22] And because the "public owner" is free under the Second Circuit's decision to hire a private company to actually operate the facility,[23] there is little, if any, disincentive to conversion.

Given the enormous financial benefits that flow control laws can bring to a local government, there can be little doubt that counties and municipalities will quickly move to take advantage of the conversion option wherever possible.[24] While this will necessarily require the cooperation of existing private owners, the monopoly profits made possible by flow control should be more than enough to outweigh the costs of conversion and make the conversion desirable for both the local government and the private owner. Thus, the financial balance is likely to weigh heavily in favor of conversion, further exacerbating the pernicious effects of the public-private distinction invented below.

---

[22] Under the agreement between the counties and the waste management authority, the authority is to manage and dispose of all solid waste within the counties and operate the local energy recovery facility and recycling center. In return, the counties guarantee the authority's operating costs and debt service payments. Pet. App. at 26a.

[23] Pet. App. at 28a.

[24] Of course, flow control imposes substantial financial penalties on haulers who are forced to pay disposal prices not subject to free and fair market competition. In this case, the record reveals that haulers were forced to pay $86 per ton when disposing of waste at Respondents' facilities, when the market rate at other nearby landfills was less than $30 per ton. Pet. App. at 29a-30a.

III. THE SECOND CIRCUIT'S EMPHASIS ON FACILITY OWNERSHIP IS AT ODDS WITH MODERN BUSINESS REALITIES AND THIS COURT'S CURRENT COMMERCE CLAUSE JURISPRUDENCE.

The essential premise of the Second Circuit's decision is that there is such a fundamental difference between privately-owned and publicly-owned waste facilities that a different set of Commerce Clause principles should apply. This premise, however, is simply wrong. In today's world, public and private waste facilities are equal in the eyes of regulators and the marketplace. The decision as to whether a particular facility should be structured as a publicly owned or privately owned entity is typically driven by practical business considerations, such as the most advantageous financing mechanism, potential tax consequences, and other issues, that are wholly unrelated to the theoretical concepts that underlie the Second Circuit's decision.

In this context, it makes no sense to conclude, as did the Second Circuit, that the constitutionality of flow control laws enacted to funnel all trash in two upstate New York counties to a local facility should turn on whether that facility is publicly or privately owned. This is highlighted by the fact that in over 500 counties throughout the United States, including dozens of counties in New York alone, there is a mix of privately owned and publicly owned waste facilities.[25] In such counties, private sector landfills, waste-to-energy facilities and transfer stations compete directly with publicly owned facilities for solid waste. Under the Second Circuit's "surprising" decision, a flow control law would be valid as to the publicly owned facilities in these counties and invalid as to the privately owned facilities, even though the difference in

---

[25] Chartwell Information, *The Directory & Atlas of Solid Waste Disposal Facilities 2003* (7th ed. 2003).

ownership has no practical impact either on the way in which the flow control law affects interstate commerce or on the day-to-day operation of the facilities. The constitutionality of a flow control law would thus turn not on an ordinance's effect on interstate commerce, but on the mere happenstance of who holds ownership in the particular facilities.

This myopic focus on ownership is at odds with both the general thrust of modern business law and this Court's current Commerce Clause jurisprudence. From the business law perspective, the clear trend is to look to the substance of a transaction, rather than technical ownership. A prime example is found in Article 9 of the Uniform Commercial Code ("UCC"), which has been adopted by all fifty states and the District of Columbia. Since 1962, the UCC has provided that the location of title to collateral (*i.e.*, ownership) generally is immaterial for purposes of determining the rights and duties of parties to a secured transaction.[26] This simply reflects the reality that property ownership is no longer of talismanic significance in business transactions. The Second Circuit's "form over substance" approach is also contrary to this Court's current Commerce Clause jurisprudence. Addressing the Commerce Clause issues raised by certain state taxes on interstate motor carriers, this Court in *ATA* emphasized that it had "'moved toward a standard of permissibility of state taxation, based upon its actual effect rather than its legal terminology.'" 483 U.S. at 295 (quoting *Complete Auto Transit v. Brady*, 430 U.S. 274, 281 (1977)). Eschewing the "metaphysical approach to the Commerce Clause that focused primarily on the character of the privilege rather than the practical consequences of the tax," *id.* at 294-95, the Court evaluated the constitutionality of the challenged taxes on the basis of "whether the tax produces a forbidden effect." *Complete Auto Transit*, 430 U.S. at 288. The same approach

---

[26] *See* U.C.C. § 9-202 (2000).

was followed in *Carbone*, where this Court focused on the fact that the "economic effects [of the flow control law] are interstate in reach" and concluded that "[t]hese economic effects are more than enough to bring the Clarkstown ordinance within the purview of the Commerce Clause." 511 U.S. at 389. From a practical standpoint, it is clear that the "effect" of local flow control laws on interstate commerce is no different when the favored local facility is publicly owned than when it is privately owned. In either case, the "guarantee of a free trade area among States," *ATA*, 483 U.S. at 281, is violated when a local government forces all trash in its jurisdiction to go to a local facility. From the perspective of the out-of-state waste facilities that can no longer compete for trash generated in a particular county or municipality, it is irrelevant whether the local facility that is the beneficiary of the flow control ordinance is owned by a private entity or by the local waste authority. In either event, the "protectionist effect of the ordinance," *Carbone*, 511 U.S. at 392, is the same—the locally generated waste is hoarded for the benefit of the local facility and the out-of-state competitors are shut out of the market.

Similarly, the effect on the local trash haulers is the same, regardless of whether the facility designated by the flow control laws is publicly owned or privately owned. In either case, those haulers who had been hauling trash to out-of-state waste facilities will now have to take that trash to the designated local facility—and pay the higher tipping fee charged by that facility.[27] They too are being deprived of access to the interstate market for solid waste services, contrary to the precepts of the Commerce Clause. Regardless of whether flow control laws favor publicly or privately owned facilities,

---

[27] As the Second Circuit previously recognized in the case at bar, "[e]ven the lowest tipping fee charged under the Counties' scheme is higher than the market value for the disposal services the Authority provides." Pet. App. at 29a.

the ripple effect of such laws will be felt throughout the interstate transportation industry. A return to flow control will prevent railroads and barges from accessing the interstate market for solid waste services. Railroads and barge lines increasingly are entering into contracts for the long-distance transport of high volumes of trash to out-of-state disposal facilities.[28] By forcing waste to be taken to local facilities, the public-private distinction invented by the Second Circuit will adversely impact those railroads and barges already engaged in, or planning to become engaged in, the interstate transportation of waste by rail and inland waterways, respectively.

The Supreme Court's endorsement of the public-private distinction would affect not only those businesses specifically engaged in the interstate transportation of waste, but the multitude of ordinary businesses that generate waste. Most obviously, the creation of local government monopolies over solid waste disposal will prevent such waste generators from reaping the benefits of a competitive marketplace for disposal services, including the ability to shop for price, quality of service, and indemnification from environmental liability. The Second Circuit's belief that a flow control law forcing trash to go to a publicly owned facility is "less likely to give rise to retaliation and jealousy from neighboring states," Pet. App. at 48a, than one that forces trash to go to a privately owned facility, is simply naïve. The effect on an out-of-state waste facility that is shut out of a market by flow control is the same, regardless of who owns the favored facility, as is the effect on the municipality or county in which that out-of-

---

[28] For example, the recently approved New York City Solid Waste Management Plan calls for the transport of most of New York City's solid waste by rail or barge, in large part, because such modes of transport will have a lesser adverse impact on the environment. See Department of Sanitation, *Comprehensive Solid Waste Mgmt. Plan* (July 2006) at www.nyc.gov/html/dsny/html/reports/swmp-4oct.shtml.

state facility is located. A local government in a neighboring state that finds its financial well-being jeopardized by the loss of business experienced by its own waste facility is unlikely to eschew "retaliatory" measures simply because the flow control law responsible for its problems is directing waste to a publicly owned, rather than a privately owned, facility. Realistically, each local jurisdiction will act to protect its own interests—including, when necessary, retaliatory measures against other localities. This is precisely what the Commerce Clause was intended to prevent.

IV. WASTE DISPOSAL IS NOT SOLELY A MUNICIPAL FUNCTION

While waste management has historically been "a traditional interest of local government," Respondents' Brief in Opposition at 6, waste disposal is not now, and has never been, exclusively or even primarily a municipal function. The local municipal "dumps" of generations past helped cause the environmental degradation that compelled Congress to enact RCRA and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq*. Today, nearly two-thirds of solid waste received at landfills is received at private sector landfills.[29] These modern, heavily regulated[30] and environmentally protective disposal facilities safely manage the majority of the waste generated in the United States. Further, the majority of new modern landfills (or expansions of existing landfills) are being constructed by private companies, not local governments. According to a recently issued survey, eight of the

---

[29] Waste News Market Handbook 2005 at 27.

[30] See 40 C.F.R. Part 258 (RCRA Subtitle D regulations). Modern landfills are also regulated under the Clean Air Act. See 40 C.F.R. §§ 60.30c-36c (emission guidelines); 40 C.F.R. §§ 60.750-759 (performance standards); 40 C.F.R. §§ 62.14350-14356; 40 C.F.R. §§ 63.1930-1990 (hazardous air pollutants).

ten largest landfills in the United States are privately owned and operated.[31]

Moreover, to the extent local governments are directly involved in solid waste management at all, that involvement is usually limited to the *collection* of *residential* solid waste (often by municipal sanitation departments). It would be a stretch for Respondents or other local governments to assert that their "traditional" interest in waste management includes the private sector collection and disposal of waste from commercial and industrial generators.

V. THE ASSERTED BENEFITS OF FLOW CONTROL ARE ILLUSORY AND CAN BE ACHIEVED BY OTHER MEANS

Flow control proponents frequently argue that creating local waste disposal monopolies helps achieve important public policy goals. Notwithstanding the immutable fact that under the applicable "virtually per se invalid" standard, these goals do not justify discrimination against interstate commerce, the purported benefits are illusory, and often can be achieved in other ways that do not trample on important constitutional rights. See, e.g., Geoffrey Oberhaus, *The Dormant Commerce Clause Dumps New Jersey's Solid Waste "Flow Control" Regulations: Now What? Possible Constitutional Alternatives to the Current "Flow Control" System*, Vol. 29, No. 2, Rutgers L.J. (1997-98) (suggesting alternatives to flow control).

One argument frequently asserted by flow control advocates, and agreed with by the court below, Pet. App. at 20a, is that by sending solid waste to a government-owned disposal facility, a local government avoids potential environmental liability associated with improper disposal of such waste. On inspection, this argument is flawed. A local government

---

[31] See Largest Landfills, Waste News (Nov. 6, 2006) at 18.

would not have any Superfund or other liability for waste collected by private haulers disposed of at a private landfill. Further, while in generations past some waste disposal facilities became Superfund sites and waste generators were identified as potentially responsible parties (PRPs), the modern landfills developed in the wake of RCRA do not even remotely resemble the dumps of yesteryear. Finally, the federal government has recognized that it is unfair to impose liability for municipal solid waste in the same manner as for the toxic and hazardous waste frequently disposed at Superfund sites, and has enacted legislation and policies to reduce the potential liability of municipal solid waste generators.[32]

A second argument is that flow control is necessary to encourage recycling. Again, this argument is simply wrong. A federal report conclusively determined that flow control laws are not important for achieving local recycling goals.[33] Moreover, in the years after this Court struck down Clarkstown's flow control law, the national recycling rate has *increased* from 26.1% of the municipal solid waste stream in 1995 to 32.1% percent in 2005.[34] If flow control encouraged recycling, the demise of flow control following *Carbone* suggests that the recycling rate should have declined over the past twelve years.

---

[32] See Pub. L. No. 107-118 (Small Business Liability Relief and Brownfields Revitalization Act (2002) (codified at 42 U.S.C. § 9607(p) (creating qualified exemption for certain generators of municipal solid waste); U.S. Environmental Protection Agency, Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites (Feb. 5, 1998).

[33] *Flow Controls and Municipal Solid Waste*, Office of Solid Waste, EPA 530-R-95-008 (March 1995) at ES-5.

[34] See U.S. Environmental Protection Agency, Municipal Solid Waste Generation, Recycling, and Disposal in the United States: Facts and Figures for 2003 at 3 Table 2 (1995 data); U.S. Environmental Protection Agency, Municipal Solid Waste in the United States: 2005 Facts and Figures at 2 Table ES-1 (2005 data).

Further, to the extent that local governments believe that it is important to achieve these goals, there are a variety of other tools that can be used that do not discriminate against interstate commerce. Most obviously, as the Court correctly observed in *Carbone*, local governments can impose fees or taxes to "ensure the long-term survival of the designated facility." 511 U.S. at 394. Alternatively, they can reduce costs, enact uniform safety regulations or take other steps to achieve these purposes. See *U&I Sanitation*, 205 F.3d at 1071; *Lebanon Farms, supra*, at 18.

Finally, local governments generally may favor local waste disposal facilities—if they provide the option for waste to be exported to other states. A number of federal courts have upheld "intrastate" flow control laws that designate specific in-state waste disposal facilities, but allow haulers and others to take waste out-of-state.[35] While these laws create similar inefficiencies to the flow control laws at issue in this case, some courts have found that because they allow for waste to cross state lines, they do not discriminate against interstate commerce. If local governments are going to create local waste disposal monopolies, they should do so in a way that does not trample on the well-established and venerable principles underlying the dormant Commerce Clause.

Flow control allows local governments to avoid competing fairly in the highly competitive marketplace for waste disposal, by discriminating against all potential out-of-state disposal facilities. This inefficiency inexorably leads to higher waste disposal costs for waste haulers and higher waste collection costs for waste generators. The reestablishment of inefficient, local waste disposal monopolies,

---

[35] See, e.g., *IESI AR Corp. v. Northwest Ark. Regional Solid Waste Mgmt. Dist.*, 433 F.3d 600 (8th Cir. 2006); *On The Green Apartments L.L.C. v. City of Tacoma*, 241 F.3d 1235 (9th Cir. 2001).

thought to have been eradicated by this Court little more than a decade ago, should not be countenanced.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

ROBERT DIGGES
Deputy General Counsel
American Trucking
Associations, Inc.
2200 Mill Road
Alexandria, Virginia 22314
(703) 838-1700

Counsel for American Trucking Associations, Inc.

DAVID BIDERMAN *
General Counsel
National Solid Wastes
Management Association
4301 Connecticut Avenue, N.W.
Washington, D.C. 20008
(202) 364-3743

Counsel for National Solid Wastes Management Association

JAN S. AMUNDSON
Senior Vice President &
General Counsel
QUENTIN RIEGEL
Vice President, Litigation &
Deputy General Counsel
National Association of Manufacturers
1331 Pennsylvania Avenue, NW
Washington, DC 20004-1790
(202) 637-3000

Counsel for National Association of Manufacturers

* Counsel of Record

891 F

No. 05-1345

IN THE

Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., *et al.*,

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE STATES OF NEW YORK, ARKANSAS, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, KENTUCKY, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH DAKOTA, OREGON, RHODE ISLAND, TENNESSEE, VERMONT, VIRGINIA, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

CAITLIN J. HALLIGAN*
Solicitor General
DANIEL SMIRLOCK
Deputy Solicitor General
BENJAMIN N. GUTMAN
Assistant Solicitor General
JOHN J. SIPOS
Assistant Attorney General

ELIOT SPITZER
Attorney General of the State of New York
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8020

* *Counsel of Record*

Attorneys for Amici Curiae

(*Additional Attorneys Listed on Signature Page*)

TABLE OF CONTENTS

	Page
Table of Cited Authorities	i
Introduction and Interest of Amici Curiae	1
Summary of Argument	4
Argument	5
I. Laws That Fall Within the Core of State Police Powers, Like the Local Laws at Issue Here, Are Presumptively Valid Under the Dormant Commerce Clause	5
II. The Local Laws Do Not Discriminate Against Interstate Commerce Because They Do Not Privilege In-State Private Companies at the Expense of Out-of-State Companies	10
III. The Local Laws Pass the *Pike* Balancing Test Because They Do Not Have a Disparate Impact on Interstate Commerce	16
Conclusion	20

TABLE OF CITED AUTHORITIES

Page

CASES

Am. Trucking Ass'ns v. Mich. Pub. Serv. Comm'n,
545 U.S. 429 (2005) 5, 16-17

Am. Trucking Ass'ns v. Schneider,
483 U.S. 266 (1987) 17

Atl. Coast Demolition & Recycling v. Bd. of Chosen Freeholders,
112 F.3d 652 (3d Cir. 1997) 13

B.F. Goodrich Co. v. Murtha,
958 F.2d 1192 (2d Cir. 1992) 14

Bibb v. Navajo Freight Lines, Inc.,
359 U.S. 520 (1959) 19

C & A Carbone, Inc. v. Town of Clarkstown,
511 U.S. 383 (1994) ..... *passim*

Cal. Reduction Co. v. Sanitary Reduction Works,
199 U.S. 306 (1905) 7, 8, 16, 19

Camps Newfound/Owatonna, Inc. v. Town of Harrison,
520 U.S. 564 (1997) 6, 7, 14

City of Phila. v. New Jersey,
437 U.S. 617 (1978) 9, 11

Granholm v. Heald,
544 U.S. 460 (2005) 10, 12

Cited Authorities

Page

Gregory v. Ashcroft,
501 U.S. 452 (1991) 7

Hamilton v. Ky. Distilleries & Warehouse Co.,
251 U.S. 146 (1919) 6

Hunt v. Wash. State Apple Adver. Comm'n,
432 U.S. 333 (1977) 10

Kassel v. Consol. Freightways Corp.,
450 U.S. 662 (1981) 6

Lingle v. Chevron U.S.A. Inc.,
544 U.S. 528 (2005) 5, 18, 19

Maine v. Taylor,
477 U.S. 131 (1986) 10

Miller v. Johnson,
515 U.S. 900 (1995) 10

Minnesota v. Clover Leaf Creamery Co.,
449 U.S. 456 (1981) 20

New York v. United States,
505 U.S. 144 (1992) 9

N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,
514 U.S. 645 (1995) 7

Pike v. Bruce Church, Inc.,
397 U.S. 137 (1970) ..... *passim*

Cited Authorities

Page

Raymond Motor Transp., Inc. v. Rice,
434 U.S. 429 (1978) 19

S. Pac. Co. v. Arizona ex rel. Sullivan,
325 U.S. 761 (1945) 19

Sporhase v. Nebraska ex rel. Douglas,
458 U.S. 941 (1982) 6, 8

United States v. Washington,
879 F.2d 1400 (6th Cir. 1989) 12

USA Recycling, Inc. v. Town of Babylon,
66 F.3d 1272 (2d Cir. 1995) 7

W. Lynn Creamery, Inc. v. Healy,
512 U.S. 186 (1994) 11

U.S. CONSTITUTION

U.S. Const. Art. I, § 8, cl. 3 5

FEDERAL STATUTES

42 U.S.C. § 6901 8

42 U.S.C. § 6943 ..... 8, 9

42 U.S.C. § 6944 8

42 U.S.C. § 6945 8

42 U.S.C. § 9607 14

Cited Authorities

Page

STATE STATUTES

Ala. Code § 22-27-3 2

Ark. Code Ann. § 8-6-712 2

Colo. Rev. Stat. § 30-20-10 2

Conn. Gen. Stat. § 22a-220a 2

Del. Code Ann. tit. 7, § 6406 ..... 2, 3

Fla. Stat. § 403.713 2

Haw. Rev. Stat. § 340A-3 2

55 Ill. Comp. Stat. 5/5-1047 2

Ind. Code § 36-9-31-3 2

Iowa Code § 28G.4 2

Ky. Rev. Stat. Ann. § 109.059 2

Me. Rev. Stat. Ann. tit. 38, § 1304-B 2

Minn. Stat. § 115A.86 2

Miss. Code Ann. § 17-17-319 3

N.J. Stat. Ann. § 48:13A-5 3

N.Y. Pub. Auth. Law § 2049-tt 3

Cited Authorities

	Page
N.C. Gen. Stat. § 130A-294	3
Ohio Rev. Code Ann. § 343.014	3
Okla. Stat. tit. 27A, § 2-10-901	3
Ore. Rev. Stat. § 268.317	3
53 Pa. Stat. Ann. § 4000.303	3
R.I. Gen. Laws § 23-19-10	3
Tenn. Code Ann. § 68-211-814	3
Va. Code Ann. § 15.2-815	3
Wis. Stat. § 287.13	3
LOCAL LAWS	
Herkimer County Local Law No. 1 of 1990	2
Oneida County Local Law No. 1 of 1990	1

Cited Authorities

Page

MISCELLANEOUS

H.R. Rep. No. 94-1491 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238 8

Christine Jolls, *Antidiscrimination and Accommodation*, 115 Harv. L. Rev. 642 (2001) 17

EPA Office of Solid Waste, *Flow Controls and Municipal Solid Waste* (1995), *available at* http://www.epa.gov/epaoswer/non-hw/muncpl/flowctrl/report/chpiii-2.pdf 15

Nat'l Alcohol Beverage Control Ass'n, *Control Systems*, *available at* http://www.nabca.org/systems/index.php 12

Nat'l Conference of State Legislatures, *Lotteries in the United States* (2004), *available at* http://www.ncsl.org/programs/econ/lotto.htm. .. 11-12

INTRODUCTION AND INTEREST OF AMICI CURIAE

Under the federal Constitution, the general police powers — and therefore primary responsibility for protecting public health and the environment — belong to the States. This case involves a matter that lies at the core of the States' police powers: ensuring proper disposal of the garbage that their citizens produce. Unregulated garbage dumping causes air-polluting garbage and waste-tire fires, methane gas explosions, and contamination of groundwater by hazardous waste — in short, a full-blown crisis. And discarding recyclable materials needlessly reduces the supply of landfill space, driving up the cost of disposal for everyone.

Over the last few decades, the States have developed new strategies to alleviate these problems. Because poorly managed solid waste inflicts most of its harm locally, States generally vest considerable authority in local regulatory bodies, which can tailor waste-management and disposal policies to local conditions such as population density, economic considerations, and geology.

This case involves a challenge to the solid waste management plan developed by two New York counties — Oneida and Herkimer — and the Oneida-Herkimer Solid Waste Management Authority, a public benefit corporation created by New York. As part of this plan, the counties exercised their power under New York law to assume responsibility for managing all locally generated solid waste. Their local laws require that all solid waste generated within the counties be delivered to Authority-operated facilities.[1]

---

1. Oneida County Local Law No. 1 of 1990, § 2(a), provides:

> In order to provide for public health and safety, and to facilitate the conservation of vital resources, each person

(Cont'd)

To encourage their citizens to minimize their use of nonrecyclables, the counties permit solid waste that can be processed at recycling or recovery facilities to be delivered free or for a nominal fee, whereas other waste is subject to a higher fee. The revenue from these fees finances waste-management programs like recycling. The "flow control" mandated by the ordinances thus plays a key role in the counties' waste-management plan.

The local laws at issue here are not unusual; at least half the States expressly authorize local governments to employ flow control restrictions.[2] But more importantly, amici States

---

(Cont'd)

> shall provide for the removal of solid waste and recyclables from the property on which they are generated either through a service provided by a municipality or licensed private hauler, or by direct haul by the individual generator to a disposal location approved by the County.

(Pet. App. 122a.)

Herkimer County Local Law No. 1 of 1990, § 2(c), provides:

> After placement of garbage and of recyclable materials at the roadside or other designated area approved by the Legislature by a person for collection in accordance herewith, such garbage and recyclable material shall be delivered to the appropriate facility designated by the Legislature, or by the Authority pursuant to contract with the County.

(Pet. App. 135a.)

2. *See, e.g.*, Ala. Code § 22-27-3(a)(2); Ark. Code Ann. § 8-6-712(a)(1)(A); Colo. Rev. Stat. § 30-20-107; Conn. Gen. Stat. § 22a-220a; Del. Code Ann. tit. 7, § 6406(31); Fla. Stat. § 403.713; Haw. Rev. Stat. § 340A-3(a); 55 Ill. Comp. Stat. 5/5-1047; Ind. Code § 36-9-31-3(9); Iowa Code § 28G.4(4); Ky. Rev. Stat. Ann. § 109.059; Me. Rev. Stat. Ann. tit. 38, § 1304-B(2); Minn. Stat. § 115A.86; (Cont'd)

— whether or not they use flow control — are united in believing that this choice should be left to each State's legislature, which should be free to experiment with different approaches to solid waste management.

The States also are keenly interested in this case because it involves the "dormant" or "negative" implication of the Commerce Clause, which has been understood to restrict States from enacting protectionist polices that favor local private economic interests at the expense of out-of-state interests. When this doctrine is applied properly, it benefits everyone by preventing economic Balkanization of the nation. But in this case, by seeking to extinguish a State's right to supplant the private sector — which includes both local and out-of-state firms — in an area of legitimate public concern, petitioners would have this Court stretch the dormant Commerce Clause far beyond its anti-protectionist purpose. Because petitioners' approach intrudes unnecessarily on the States' sovereignty and threatens to federalize basic decisions about how the States exercise their police powers, it should be rejected and the decision below affirmed.

(Cont'd)

Miss. Code Ann. § 17-17-319(2); N.J. Stat. Ann. § 48:13A-5; N.Y. Pub. Auth. Law § 2049-tt(3); N.C. Gen. Stat. § 130A-294(a)(5b); Ohio Rev. Code Ann. § 343.014; Okla. Stat. tit. 27A, § 2-10-901(C); Ore. Rev. Stat. § 268.317(3)-(4); 53 Pa. Stat. Ann. § 4000.303(e); R.I. Gen. Laws § 23-19-10(40); Tenn. Code Ann. § 68-211-814(b)(1)(A); Va. Code Ann. § 15.2-815; Wis. Stat. § 287.13. Some of these laws apply only to flow control to a public facility. *See, e.g.*, Del. Code Ann. tit 7, § 6406(31).

SUMMARY OF ARGUMENT

1. State laws that aim to protect public health and safety are presumptively valid under the dormant Commerce Clause. That presumption of validity applies here, because ensuring safe and responsible disposal of locally generated waste falls within the core of a State's traditional police powers. Congress confirmed this in the Resource Conservation and Recovery Act ("RCRA"), which recognizes that solid waste management should continue to be primarily a local function.

2. Unlike the town ordinance this Court invalidated in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), the local laws at issue in this case do not discriminate against interstate commerce. There is a meaningful difference between, on the one hand, laws that privilege local private firms at the expense of their out-of-state competitors, and, on the other, laws that privilege the government over all private actors, whether in-state or out-of-state. The former may be protectionist, like the town ordinance in *Carbone*, where their admitted purpose is merely to bolster a local firm's revenue. The latter, by contrast, are not protectionist, because their purpose is protecting the public from the adverse consequences that may result from private, purely profit-driven control of a service. With respect to activities such as running a lottery, selling liquor, or processing solid waste, States — and, with their permission, local governments — legitimately may use their police power to ban the private sector from offering a service the government provides. Such a decision is not subject to heightened scrutiny under the dormant Commerce Clause.

3. The counties' laws easily pass the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), because they impose no qualitatively or quantitatively greater

burden on interstate commerce than on intrastate commerce. Under *Pike*, only burdens falling disproportionately on interstate commerce must be weighed against the benefits of the local law. Limiting the test in this manner ensures that it remains moored to the underlying purpose of the dormant Commerce Clause, because measures that have a disparate impact on interstate commerce without offering legitimate local benefits are likely to have protectionist purposes behind them. Petitioners' approach, by contrast, would turn *Pike* balancing into a general license for the courts to second-guess virtually any public policy judgment made by the legislature. This Court rejected a similarly open-ended interpretation of the Takings Clause in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), when it held that a law does not effect a taking merely because it does not substantially advance legitimate state interests. The Court should reach the same conclusion here with respect to the dormant Commerce Clause.

ARGUMENT

POINT I

LAWS THAT FALL WITHIN THE CORE OF STATE POLICE POWERS, LIKE THE LOCAL LAWS AT ISSUE HERE, ARE PRESUMPTIVELY VALID UNDER THE DORMANT COMMERCE CLAUSE

Although by its terms, the Commerce Clause merely grants Congress the "Power . . . To regulate Commerce . . . among the several States," U.S. Const. Art. I, § 8, cl. 3, this Court understands the Commerce Clause also to have a "dormant" or "negative" implication that curbs the power of States to regulate interstate commerce. *See Am. Trucking Ass'ns v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005); *but see id.* at 439 (Thomas, J., concurring in the

judgment) ("[T]he negative Commerce Clause . . . cannot serve as a basis for striking down a state statute." (quotation marks omitted)). The dormant Commerce Clause prohibits the States from enacting protectionist measures that invite retaliatory responses from their neighbors, which if unchecked would lead to "economic Balkanization." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 577 (1997) (quotation marks omitted).

But this Court has "long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other." *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956 (1982). The Tenth Amendment reserves the general police powers to the States. *See Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919). Thus, when a State uses those powers to regulate "for the purpose of protecting the health of its citizens — and not simply the health of its economy," *Sporhase*, 458 U.S. at 956, there is a strong presumption that the State's actions are constitutional under the dormant Commerce Clause. *See Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 670 (1981) (plurality op.) (recognizing that "a State's power to regulate commerce is never greater than in matters traditionally of local concern" and that such regulations come with a "strong presumption of validity" (quotation marks omitted)).

This presumption of validity mirrors presumptions that this Court applies in other situations implicating the Tenth Amendment because they involve the balance of powers between the federal and state governments. For example, when Congress enacts positive law touching on an area of traditional state concern, there is a presumption that it does not intend to preempt state law:

> [W]e have never assumed lightly that Congress has derogated state regulation, but instead have

> addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. Indeed, . . . where federal law is said to bar state action in fields of traditional state regulation, we have worked on the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654-55 (1995) (citations and quotation marks omitted). Similarly, when "Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quotation marks omitted). Just as affirmative congressional pronouncements are tempered by a presumption that Congress would not interfere with areas of traditional state concern, Congress's silence should not be understood as casually usurping the States' traditional police powers. *Cf. Camps Newfound/Owatonna*, 520 U.S. at 572 (noting that "Congress unquestionably has the power to repudiate or substantially modify" the effects of the dormant Commerce Clause through positive legislation).

Such a presumption of validity surely applies in this case, because the power to manage the disposal of locally generated solid waste lies at the core of the States' traditional police powers. *See Cal. Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306, 318 (1905) (upholding against a substantive due process challenge a county ordinance that required all locally generated waste to be delivered to a public facility for cremation); *see also USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1275 (2d Cir. 1995) ("For ninety years, it has been settled law that garbage collection and

disposal is a core function of local government in the United States."). This Court has long recognized that flow control has a "real, substantial relation to the protection of the public health" that justifies its restrictions. *Cal. Reduction Co.*, 199 U.S. at 320. While that analysis proceeded under the Fourteenth Amendment rather than the dormant Commerce Clause, *id.* at 317-18, its conclusion is equally applicable here. Flow control, when part of an integrated waste-management plan, is a legitimate form of "health and safety regulation," not simply "economic protectionism," *Sporhase*, 458 U.S. at 956, and thus is presumptively valid.

More recently, Congress confirmed in RCRA that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies." 42 U.S.C. § 6901(a)(4). Congress had no desire to federalize control over what traditionally had been a local activity. RCRA therefore set national goals and standards, but placed primary responsibility on the States to develop solid waste management plans that promote the national goals of recycling, energy recovery, resource conservation, and environmentally sound disposal methods. *Id.* § 6943(b).

Thus, under RCRA, the States shoulder the burdens both of remediating the primitive dumps of the past and of identifying alternatives to meet their communities' needs. *Id.* §§ 6943(a)(2)-(3), 6944-6945. Congress expected that the States would use their police powers, including flow control, to meet their responsibilities for managing solid waste. *See, e.g.*, H.R. Rep. No. 94-1491, pt. 1, at 34 (1976) (explaining that RCRA "is not to be construed to affect state planning which may require all discarded materials to be transported to a particular location"), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6272. In fact, Congress prohibited the States from hampering the efforts of local governments to employ tools like flow control: RCRA prohibits state barriers

that prevent local governments from "entering into long-term contracts for the supply of solid waste to resource recovery facilities . . . [or] for the operation of such facilities, or from securing long-term markets for material and energy recovered from such facilities or for conserving materials or energy by reducing the volume of waste." 42 U.S.C. § 6943(a)(5).

RCRA does not, of course, authorize a State to enact protectionist legislation that intentionally discriminates against out-of-state commerce in favor of local economic interests. *See, e.g., City of Phila. v. New Jersey*, 437 U.S. 617, 629 (1978) (striking down a state law that allowed private landfills to accept in-state, but not out-of-state, waste); *C & A Carbone, Inc. v. Town of Clarkston*, 511 U.S. 383, 409 (1994) (O'Connor, J., concurring in the judgment) (concluding that RCRA does not authorize protectionist waste-disposal laws that favor a single local private actor over out-of-state firms). But RCRA confirms that in the area of local waste management, the dormant Commerce Clause should not be extended beyond its core function of preventing protectionism.

That is particularly true here, because the subject of this case — a government's decision to take title to waste generated by its citizens — implicates core sovereignty interests. In *New York v. United States*, 505 U.S. 144, 175 (1992), this Court struck down federal legislation, enacted pursuant to the Commerce Clause, that infringed on this interest by forcing the State to take title to locally generated low-level radioactive waste. Just as the positive Commerce Clause powers cannot be invoked to compel the States to take title to locally generated waste, the dormant Commerce Clause does not prohibit the States from choosing to take title to that waste, provided that they do so evenhandedly.

POINT II

THE LOCAL LAWS DO NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE BECAUSE THEY DO NOT PRIVILEGE IN-STATE PRIVATE COMPANIES AT THE EXPENSE OF OUT-OF-STATE COMPANIES

Under the dormant Commerce Clause, a state or local law is subject to heightened scrutiny only if it intentionally discriminates against out-of-state commerce. *See Maine v. Taylor*, 477 U.S. 131, 138 (1986). A law intentionally discriminates if on its face it treats out-of-state commerce less favorably than in-state commerce, *see, e.g., Granholm v. Heald*, 544 U.S. 460, 473-74 (2005) (state law allowing in-state, but not out-of-state, wineries to ship directly to consumers), or if it has a protectionist purpose. Like any discriminatory purpose, a protectionist purpose can be demonstrated by direct evidence of motive or by circumstantial evidence, such as an overwhelmingly disproportionate effect on interstate commerce. *See, e.g., Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 351-53 (1977) (in addition to direct evidence of discriminatory intent, relying on the fact that the burden of the facially neutral regulation fell entirely on out-of-state businesses); *cf. Miller v. Johnson*, 515 U.S. 900, 913-14 (1995) (recognizing that discriminatory intent can be proved through a "stark" pattern of governmental action that is "unexplainable on grounds other than" discrimination, but that otherwise "impact alone is not determinative" (quotation marks omitted)).

Petitioners' argument that the counties' laws discriminate against interstate commerce rests on the mistaken premise that two types of governmental action are constitutionally equivalent: actions favoring local private firms at the expense

of out-of-state competitors, and actions allowing the government itself to provide a service that the private sector — both in-state and out-of-state — is prohibited from offering. Only the former are discriminatory and thus subject to heightened scrutiny under the dormant Commerce Clause.

Laws that discriminate against interstate commerce merit heightened scrutiny because they are presumed to be protectionist. *See W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192 (1994) (stating that state laws that "clearly discriminate against interstate commerce" are invalid unless they can be shown to serve a purpose "unrelated to economic protectionism" (quotation marks omitted)). Unlike laws that privilege local private interests, laws that ban the private sector from offering a commodity or service that the government provides generally do not raise concerns of protectionism. Sometimes, the general welfare will be inconsistent with private, profit-driven activity. The private sector might offer an alternative that in the short term is cheaper but in the long run inflicts significant costs on the public at large, rather than a product that is pricier in the short term but mitigates the harmful and expensive long-term consequences. Allowing the private sector to operate in this situation would trigger a race to the bottom in which only the cheap, but more harmful, alternative would survive. Governments displace the private sector in these situations not simply to make money, but to promote the public interest. Because that motive is not protectionist, it does not implicate the dormant Commerce Clause. *Cf. City of Phila.*, 437 U.S. at 629 (a law that "simply prevented traffic in noxious articles" does not "discriminate against interstate commerce as such").

For example, at least forty States run state-sponsored lotteries, with some using the proceeds to support specific public purposes such as education. *See* Nat'l Conference

of State Legislatures, *Lotteries in the United States* (2004), *available at* http://www.ncsl.org/programs/econ/lotto.htm. These States generally ban private companies from running their own lotteries, because they have concluded that gambling poses risks to the public welfare — risks that can be best weighed and managed by a state-run lottery. While those legislative judgments may be debatable, and different States may balance the competing interests differently, they do not implicate the dormant Commerce Clause. *Cf. United States v. Washington*, 879 F.2d 1400, 1401 (6th Cir. 1989) (upholding a conviction based on Michigan's law banning private lotteries even though the State runs its own lottery; noting that "[i]t is rational for the Michigan legislature to choose to attack only the dangers presented by private lotteries (such as cheating, fraud, and particularly the involvement of organized crime)"). Under petitioners' interpretation of the dormant Commerce Clause, however, a State that sponsored its own lottery might be forced to legalize private gambling, too, because otherwise it would be discriminating against out-of-state gaming interests.

Similarly, more than a third of the States have chosen to ban private retail sale of some kinds of alcohol, allowing those drinks to be purchased only from state-run stores. *See* Nat'l Alcohol Beverage Control Ass'n, *Control Systems*, *available at* http://www.nabca.org/systems/index.php. Here too, States have come to different judgments about the wisdom as a policy matter of private or public retail sales. But as long as the State regulates evenhandedly — that is, does not impose greater restrictions on out-of-state beverages than on in-state beverages — the dormant Commerce Clause is not implicated. *Cf. Granholm*, 544 U.S. at 473-76 (concluding that the dormant Commerce Clause is implicated by state laws allowing in-state wineries, but not out-of-state wineries, to ship their wine directly to consumers).

By contrast, laws that privilege *private* firms, like the one at issue in *Carbone*, may raise concerns of protectionism.[3] In *Carbone*, this Court struck down a flow control ordinance requiring that all solid waste be processed at a single local, private transfer station. 511 U.S. at 386. The admitted purpose of the ordinance was discriminatory: to direct business that otherwise would go to out-of-state firms to a local commercial interest. *Id.* Although the town planned to buy the transfer station eventually, *id.* at 387, there was no reason to think that it would continue to require flow control after it took over. Flow control was not part of an integrated waste-management scheme; it was merely a way to pay off the private firm that had built the station. Because that purpose was protectionist, and because flow control advanced no legitimate governmental interests, the ordinance was invalid. *Id.* at 392.

The local laws at issue here, however, serve non-protectionist interests, and in that respect they are more similar to laws governing lotteries or the sale of alcohol than to the law struck down in *Carbone*. The counties use flow control as part of an integrated solid waste management plan. Among other things, the plan replaced "high volume, undifferentiated waste disposal methods with a system that would match the best management method to each component of solid waste"; made "waste reduction and recycling legally mandated top priorities for solid waste management"; and established and expanded markets for

---

3. Those concerns would diminish, and perhaps disappear entirely, if the government selected the private firm through open, competitive bidding. *See, e.g., Atl. Coast Demolition & Recycling v. Bd. of Chosen Freeholders*, 112 F.3d 652, 663 (3d Cir. 1997) ("[A] law that directs waste to a particular facility will not necessarily violate the dormant Commerce Clause as long as out-of-state operators are given an even chance to compete for the opportunity to dispose of the state or district's waste."). That issue is not presented in this case.

recyclables (J.A. 374a). The relatively high fee for disposal of nonrecyclable waste deters residents from generating that waste (J.A. 381a-382a). Likewise, by offering free or below-market-cost services that reuse or recycle solid waste, the Authority provides an economic incentive for residents to shift toward recyclable and reusable materials (J.A. 377a-378a). The Authority accepts and recycles dozens of types of waste products, many of which are not commonly recycled by other public or private waste-management programs because of their unprofitability (J.A. 378a). Flow control plays a vital role in providing these benefits.

And unlike the *Carbone* ordinance, the counties' laws are not likely to provoke the sort of retaliatory response by other States that the dormant Commerce Clause seeks to forestall. *See Camps Newfound/Owatonna*, 520 U.S. at 577. Measures that favor a local private business implicate that concern, because if one State artificially pumps up the profits of a local business through flow control, its neighbors may feel compelled to do the same for their local businesses to keep them competitive. But municipalities that require flow control to their own public facilities potentially assume massive liability under CERCLA if the waste is not handled properly. *See* 42 U.S.C. § 9607(a); *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992). They thus are likely to proceed cautiously, agreeing to take on that liability only if they have in place a comprehensive waste-management plan like the one at issue in this case — a plan whose development requires the government to commit an enormous amount of public resources. Municipalities are unlikely to expend those resources and assume liability merely to increase marginally the profits of a local private company. States or localities that choose to make waste processing an exclusively governmental service will do so because it best serves their citizens' needs, not simply as a reaction to similar laws elsewhere.

Petitioners' objection that flow control is economically inefficient because citizens may pay more per ton then they would if they could hire private haulers to dump their waste in a landfill, Petrs.' Br. at 18, misses the point of the counties' efforts here. Their goal is not simply to offer the cheapest disposal service, but to offer one with the most value. The Authority charges a higher price for processing some kinds of solid waste — and none for other services such as recycling, even though they cost more to provide — in part to encourage the counties' citizens to reduce or recycle their waste. Overall, the better services are worth the higher price. EPA Office of Solid Waste, *Flow Controls and Municipal Solid Waste* III-78 (1995) (concluding that integrated solid waste management is a "cost-effective" approach and that flow control ensures funding for the elements of a program that do not generate their own revenue, such as disposal of household hazardous waste), *available at* http://www.epa.gov/epaoswer/non-hw/muncpl/flowctrl/report/chpiii-2.pdf. And without flow control, all of the profitable waste-management business would go to private firms and the Authority would end up burdened with only the high-cost, low-revenue services like recycling.

The Authority's waste-processing service is thus quite different from the hypothetical scenarios that petitioners conjure. *See, e.g.*, Petrs.' Br. at 28, 30-31, 34-35. Those hypotheticals involve services — packaging shrimp, slaughtering meat, selling milk, manufacturing cement, and processing raw lumber — that there is no apparent reason to ban the private sector from providing. A State might choose to manufacture its own cement, for example, and even to sell it to others, but properly regulated private cement-manufacturing does not harm the public. Private waste processing is different, because it may fail to provide services such as recycling that — while unprofitable — benefit

the public. That is why waste processing is traditionally a governmental function. *See Cal. Reduction Co.*, 199 U.S. at 318.

Nor do the local laws at issue here raise the inconsistency-of-state-laws problem that plagued the local law in *Carbone*. *See* 511 U.S. at 406-07 (O'Connor, J., concurring in the judgment) (explaining that the law should be evaluated not just on its own, but also by considering how it would work if other States enacted similar laws). The *Carbone* law covered not just locally generated waste, but any waste that happened to be in the town, even if it came from out of state. *Id.* at 407. That gave rise to a real conflict: Under New Jersey law, waste could be transported to the town for processing but had to be returned for disposal, whereas under the local law, once the waste was brought in it had to remain there. *Id.* The counties' laws here, however, apply only to locally generated waste. Even if every municipality in the country enacted such laws, there would be no conflict, because waste can be generated in only one place. Because those laws are far removed from the dormant Commerce Clause's concerns about protectionism, they should not be subjected to heightened scrutiny.

POINT III

THE LOCAL LAWS PASS THE *PIKE* BALANCING TEST BECAUSE THEY DO NOT HAVE A DISPARATE IMPACT ON INTERSTATE COMMERCE

A State or local law that, while not intentionally discriminating against interstate commerce, nonetheless incidentally burdens it, is valid unless the burden clearly exceeds the law's local benefits. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *but see Am. Trucking Ass'ns,*

545 U.S. at 439 (Scalia, J., concurring in the judgment) (rejecting this aspect of the dormant Commerce Clause unless the law at issue is indistinguishable from one previously invalidated by the Court). In other words, if a law has a disparate impact on interstate commerce — imposes burdens on interstate commerce that are quantitatively or qualitatively different from those imposed on intrastate commerce — it may be invalid.

When a disparate impact cannot be justified by legitimate local interests, that suggests that the real motivation may be protectionist, thus implicating the policy behind the dormant Commerce Clause. *Cf.* Christine Jolls, *Antidiscrimination and Accommodation*, 115 Harv. L. Rev. 642, 652 (2001) (a "leading gloss" on disparate impact liability is that it "functions as a means of smoking out subtle or underlying forms of intentional discrimination"). But if the burdens on interstate commerce are the same as those on intrastate commerce — in other words, the law burdens commerce generally but not interstate commerce in particular — then the dormant Commerce Clause is not implicated. *See Am. Trucking Ass'ns v. Schneider*, 483 U.S. 266, 283 n.15 (1987) (a "disincentive [that] affects local and out-of-state vehicles in precisely the same way . . . does not implicate the Commerce Clause"). In this situation there is no need even to inquire about the potential benefits of the law because there is no cognizable burden to weigh against the benefits under the *Pike* balancing test.

To hold otherwise would be to turn the dormant Commerce Clause into a free-ranging license to second-guess virtually any state law on the ground that it is not economically efficient — that is, that its burdens on commerce generally (not interstate commerce in particular) outweigh its benefits. That takes the doctrine far beyond its

purposes, and is precisely the sort of constitutional expansion that this Court recently rejected in the context of the Takings Clause. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). In *Lingle*, the Court unanimously disclaimed language from earlier cases suggesting that a law effected a taking if it did not "substantially advance legitimate state interests." *Id.* at 531 (quotation marks omitted). It explained that this test would present "serious practical difficulties" because it

> can be read to demand heightened means-ends review of virtually any regulation of private property. If so interpreted, it would require courts to scrutinize the efficacy of a vast array of state and federal regulations — a task for which courts are not well suited. Moreover, it would empower — and might often require — courts to substitute their predictive judgments for those of elected legislatures and expert agencies.

Id. at 544.

The same is true of an expansive interpretation of the dormant Commerce Clause. By suggesting that the courts may balance the benefits of a law against its burdens on commerce generally, even when there is no disparate impact on interstate commerce in particular, petitioners invite the courts to substitute their judgment for the state legislatures' as to a law's efficacy and desirability as a matter of policy. For example, here petitioners ask this Court to invalidate the local laws because, in their view, it is more effective to process the counties' solid waste elsewhere. Thus, in their view, a court must decide whether, as a policy matter, the benefits of the local laws for public health and the environment outweigh the economic drawbacks they

postulate. The courts are ill-equipped to handle this sort of inquiry.[4]

This Court's precedent applying the *Pike* balancing test is consistent with a narrow understanding of the burdens to be weighed. Whenever this Court has struck down a state law for burdening interstate commerce, it has identified a burden that imposes quantitative or qualitative disadvantages on interstate businesses in particular. For example, a State's idiosyncratic rule governing an activity that easily crosses state lines may impose a greater burden on businesses that compete in interstate commerce than on those that operate just in one State. *See, e.g., Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 445 (1978) (striking down under *Pike* a state regulation limiting the length of trucks operating on highways within the State); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 526-30 (1959) (holding that a State could not constitutionally require a unique type of truck mudguard when such a regulation conflicted with other States' mudguard requirements); *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 773 (1945) (holding that a regulation limiting train lengths "materially impedes the movement of . . . interstate trains" through the States). Each of these cases involved regulations that, though equally applicable in-state and out-of-state, imposed substantial burdens on commerce traveling among the States. Because those burdens — such as shortening trains or removing mud flaps — did not affect interests acting in-state only, they gave domestic firms a competitive advantage over multi-state competitors. Similarly, *Pike* itself involved a regulation that in practice required a grower to package its produce within the State — a rule that largely affected only businesses that otherwise would have packaged their produce

4. This sort of means-ends inquiry might be appropriate in the context of a substantive due process challenge. *See Lingle*, 544 U.S. at 542. But it has little to do with preventing economic protectionism, which is the mission of the dormant Commerce Clause. In any event, petitioners do not dispute that flow control satisfies substantive due process. *See Cal. Reduction Co.*, 199 U.S. at 319-21.

out of state. 397 U.S. at 144; *cf. Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981) (applying *Pike* balancing only after assuming that the out-of-state industry "is burdened *relatively* more heavily than" the in-state industry (emphasis added)).

The county ordinances at issue here easily pass a properly constrained *Pike* balancing test. Petitioners make no serious effort to show that the laws impose a quantitatively or qualitatively different burden on interstate commerce than they do on intrastate commerce. The most they claim is that the laws prohibit in-state generators and private haulers from patronizing out-of-state facilities. Petrs.' Br. at 46 n.15. But the county ordinances prohibit generators and haulers from patronizing either in-state or out-of-state non-Authority facilities. Thus, while they may well affect *commerce*, they do not impose a cognizable burden on *interstate* commerce, and they are therefore valid under the dormant Commerce Clause.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

CAITLIN J. HALLIGAN*
Solicitor General
DANIEL SMIRLOCK
Deputy Solicitor General
BENJAMIN N. GUTMAN
Assistant Solicitor General
JOHN J. SIPOS
Assistant Attorney General

ELIOT SPITZER
Attorney General of the State of New York
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8020

* *Counsel of Record*

MIKE BEEBE
Attorney General
of Arkansas
323 Center Street
Little Rock, AR 72201
(501) 682-2007

BILL LOCKYER
Attorney General
of California
1300 I Street
Sacramento, CA 95814
(916) 445-9555

RICHARD BLUMENTHAL
Attorney General
of Connecticut
55 Elm Street
Hartford, CT 06106
(860) 808-5318

CARL C. DANBERG
Attorney General of Delaware
820 North French Street
Wilmington, DE 19801
(302) 577-8400

MARK J. BENNETT
Attorney General of Hawaii
425 Queen Street
Honolulu, HI 96813
(808) 586-1500

LISA MADIGAN
Attorney General of Illinois
100 West Randolph Street
Chicago, IL 60601
(312) 814-3000

TOM MILLER
Attorney General of Iowa
1305 East Walnut Street
Des Moines, IA 50319
(515) 281-5164

GREGORY D. STUMBO
Attorney General
of Kentucky
700 Capitol Avenue
Suite 118
Frankfort, KY 40601
(502) 696-5300

G. STEVEN ROWE
Attorney General of Maine
Six State House Station
Augusta, ME 04333
(207) 626-8800

J. JOSEPH CURRAN, JR.
Attorney General
of Maryland
200 Saint Paul Place
Baltimore, MD 21202
(410) 576-6300

MICHAEL A. COX
Attorney General of Michigan
P.O. Box 30212
Lansing, MI 48909
(517) 373-1110

MIKE HATCH
Attorney General of Minnesota
445 Minnesota Street
St. Paul, MN 55101
(651) 296-3353

JIM HOOD
Attorney General of Mississippi
Department of Justice
P.O. Box 220
Jackson, MS 37205
(601) 359-3680

KAREN KING MITCHELL
Deputy Attorney General of Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101
(573) 751-3321

MIKE MCGRATH
Attorney General of Montana
Justice Building
215 North Sanders
Helena, MT 59620
(406) 444-2026

GEORGE J. CHANOS
Attorney General of Nevada
Nevada Department of Justice
100 North Carson Street
Carson City, NV 89701
(775) 684-1112

KELLY A. AYOTTE
Attorney General of New Hampshire
33 Capitol Street
Concord NH 03301
(603) 271-1201

STUART RABNER
Attorney General of New Jersey
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 080
Trenton, NJ 08625
(609) 292-8576

WAYNE STENEHJEM
Attorney General of North Dakota
600 East Boulevard Avenue
Bismarck ND 58505
(710) 328-2210

HARDY MYERS
Attorney General of Oregon
1162 Court Street NE
Salem, OR 97301
(503) 378-4400

PATRICK LYNCH
Attorney General
of Rhode Island
150 South Main Street
Providence, RI 02903
(401) 274-4400

ROBERT F. MCDONNELL
Attorney General
of Virginia
900 East Main Street
Richmond, VA 23219
(804) 786-2436

ROBERT E. COOPER, JR.
Attorney General
of Tennessee
425 Fifth Avenue North
P.O. Box 20207
Nashville, TN 37202
(615) 741-3491

DARRELL V. MCGRAW, JR.
Attorney General
of West Virginia
State Capitol, Room 26-E
Charleston, WV 25305
(304) 558-2021

WILLIAM H. SORRELL
Attorney General of Vermont
109 State Street
Montpelier, VT 05609
(802) 828-3173

Attorneys for Amici Curiae

887B

(17)

FILED
DEC 7 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1345

In the Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., AND INGERSOLL PICKUP INC.

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, AND COUNTY OF HERKIMER

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE ONONDAGA COUNTY RESOURCE RECOVERY AGENCY, THE DUTCHESS COUNTY RESOURCE RECOVERY AGENCY, THE COUNTY OF DUTCHESS, AND THE NEW YORK STATE ASSOCIATION FOR SOLID WASTE MANAGEMENT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

GENE C. SCHAERR
STEFFEN N. JOHNSON
GEOFFREY P. EATON
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000

BRUCE R. BRAUN
Counsel of Record
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the prohibition against "hoard[ing] solid waste" recognized in *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 392 (1994), is inapplicable when the "preferred processing facility" is operated as part of a public waste management system.

2. Whether, even if viewed as non-discriminatory, the flow-control ordinances at issue here violate the Commerce Clause under the test articulated in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION AND INTERESTS OF *AMICI CURIAE* 1

STATEMENT 3

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. FLOW CONTROL ORDINANCES FALL WELL WITHIN LOCAL GOVERNMENTS' POLICE POWER. 7

A. Sound Waste Management is An Important Health and Safety Issue And Therefore Falls Squarely Within The Police Power Of State And Local Government. 8

B. Flow Control Is Essential To Prevent "Free Riding" In The Recycling, Waste Reduction, And Other Waste-Related Environmental Programs Carried Out By Local Communities Pursuant To Their Police Power, And Is A Legitimate Exercise Of That Power. 11

II. WHERE A COMMUNITY, ACTING WITHIN ITS POLICE POWER, ENACTS A LAW DIRECTING LOCAL TRASH TO A COMMUNITY-OPERATED FACILITY THAT ITSELF EXERCISES THE POLICE POWER, SUCH A LAW DOES NOT VIOLATE THE COMMERCE CLAUSE. 15

A. Because Such A Law Benefits Only A Public Entity Carrying Out A Core Police Power Function and Regulates Only Local Waste, It Does Not "Discriminate" Against Interstate Commerce. 15

1. Because of the government's police power, there is a constitutionally significant difference between a law that favors a local government and one that favors local private enterprise. 16

2. Because the challenged laws regulate only local waste, they operate at the heart of the Counties' police power jurisdiction, and are distinguishable from the much broader regulation struck down in *Carbone*. 20

3. Upholding the challenged ordinances on police-power grounds is entirely consistent with this Court's "local processing" cases 22

B. Such A Law Does Not Pose An Undue Burden On Interstate Commerce Under The *Pike* Balancing Approach. 23

1. The District Court found as fact that the challenged ordinances imposed no burden on interstate commerce, and petitioners offer no basis for overturning that conclusion. 24

2. Even if the issue of "excessive burden" is a question of law, petitioners' *Pike* analysis fails to conduct any meaningful balancing of burdens and benefits. 26

3. Because the principal purpose of the flow-control laws here is the support of community health, safety, and welfare programs, the benefits they confer are more compelling than those in Carbone. 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES:

American Trucking Association v. *Michigan Public Service Commission*, 545 U.S. 429 (2005) 19

Baldwin v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) 22

Bates v. *Dow Agrosciences*, 544 U.S. 431 (2005) 6, 19

C&A Carbone, Inc. v. *Town of Clarkstown*, 511 U.S. 383 (1994) ..... *passim*

California Reduction Co. v. *Sanitary Reduction Works*, 199 U.S. 306 (1905) 8, 10

Cipollene v. *Liggett Group, Inc.*, 505 U.S. 504 (1992) 6, 19, 30

Dean Milk Co. v. *Madison*, 340 U.S. 349 (1951) 17

Fort Gratiot Sanitary Landfill, Inc. v. *Michigan Department of Natural Resources*, 504 U.S. 353 (1992) 17, 23

Gardner v. *Michigan*, 199 U.S. 325 (1905) 8, 9, 10, 15

General Motors Corp. v. *Tracy*, 519 U.S. 278 (1997) 15, 17, 18

Gonzales v. *Oregon*, 126 S. Ct. 904 (2006) 8

Graver Tank & Manufacturing Co. v. *Linde Air Products Co.*, 336 U.S. 271 (1949) 25

H.P. Hood & Sons v. *DuMond*,
336 U.S. 525 (1949) 7

Harvey & Harvey, Inc. v. *County of Chester*,
68 F.3d 788 (3d Cir. 1995) 9

Hutchinson v. *City of Valdosta*,
227 U.S. 303 (1913) 9

IESI AR Corp. v. *Northwest Arkansas Regional Solid Waste Management District*,
433 F.3d 600 (8th Cir. 2006) 9

Johnson v. *Haydel*,
278 U.S. 16 (1928) 22

Maharg, Inc. v. *Van Wert Solid Waste Management District*,
249 F.3d 544 (6th Cir. 2001) 9

Massachusetts v. *Department of Transportation*,
93 F.3d 890 (D.C. Cir. 1996) 9

Minnesota v. *Barber*,
136 U.S. 313 (1890) 23

Napier v. *Atlantic Coast Line Railway Co.*,
272 U.S. 605 (1926) 6, 19

New Energy Co. of Indiana v. *Limbach*,
486 U.S. 269 (1988) 17

North American Cold Storage Co. v. *City of Chicago*,
211 U.S. 306 (1908) 9

On the Green Apartments, LLC v. *City of Tacoma*,
241 F.3d 1235 (9th Cir. 2001) 9

Oregon Waste Sys, Inc. v. *Department of Environmental Quality of Oregon*,
511 U.S. 93 (1994) 17

Philadelphia v. *New Jersey*,
437 U.S. 617 (1978) 16

Pike v. *Bruce Church, Inc.*,
397 U.S. 137 (1970) ..... *passim*

Raymond Motor Transportation, Inc. v. *Rice*,
434 U.S. 429 (1978) 26-27

Reeve, Inc. v. *Stake*,
447 U.S. 429 (1980) 22

Rice v. *Santa Fe Elevator Corp.*,
331 U.S. 218 (1947) 6, 19

South-Central Timber Development, Inc. v. *Wunnicke*,
467 U.S. 82 (1984) 22

Southern Disposal, Inc. v. *Texas Waste Management*,
161 F.3d 1259 (10th Cir. 1998) 9

Southern Pacific Co. v. *Arizona ex rel Sullivan*,
325 U.S. 761 (1945) 25, 30

Toomer v. *Witsell*,
334 U.S. 385 (1948) 22

STATUTES:

42 U.S.C. § 6901(a)(4) 19

42 U.S.C. § 6901(b) 10

Herkimer County, N.Y., Section 2(c) Local Law,
Introductory No. 1 (1990) 22

MISCELLANEOUS:

The Federalist No. 46 (James Madison)
(Clinton Rossiter ed. 1961) 18

Locke, *Second Treatise on Governments* (1690) 18

New Hampshire Department of Environmental
Services, "The Cost of Flow Control": Critical
Review of the National Economic Research
Associates Analysis (May 1995) 12, 14

Onondaga County, N.Y., Annual Report (2005) 2, 13

Paul A. Samuelson and William D. Norhaus,
Economics (18th ed. 2005) 12

Joseph Stiglitz, *Public Sector Economics* (3d. ed. 2000) 14

INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[1]

This case presents an attempt by the petitioners to expand the sweep of the dormant Commerce Clause far beyond the boundaries recognized in this Court's precedents and at the expense of traditional police powers. The waste-management ordinances challenged here are community regulations, enacted pursuant to the police power, that benefit only a public entity that is itself acting pursuant to that police power. To condemn such a law as "discriminatory" under the dormant Commerce Clause would enlarge that doctrine in ways that defy this Court's established police power jurisprudence and impair the constitutional balance between national and local authority.

Indeed, the tightly focused ordinances at issue here—in which a community regulates the handling of local waste in the public interest by directing that waste to a public entity acting in furtherance of that interest—represent a non-discriminatory exercise of a traditional local police power, and as such do not threaten the core principles of the dormant Commerce Clause. Accordingly, this Court should affirm the Second Circuit's holding that these ordinances are consistent with the federal Constitution.

Amici curiae Onondaga County Resource Recovery Agency ("OCRRA"), Dutchess County Resource Recovery Agency ("DCRRA"), the County of Dutchess, New York, and the New York State Association for Solid Waste Management (the "Association"), have strong interests in that outcome. Both OCRRA and DCRRA were created under the same statutory authority as respondent Oneida-Herkimer Solid Waste Management Authority and are similar to Oneida-Herkimer in their purpose, organiza-

---

[1] Pursuant to Supreme Court Rule 37(2)(a), *amici curiae* file this brief in support of respondents with the consent of the parties.

tional structure, and operations. Like respondent, OCRRA and DCRRA have a responsibility to provide the communities they serve with "a solid waste solution that is environmentally sound, highly efficient, safe and innovative, by utilizing the optimal mix of waste reduction, recycling and disposal." Onondaga County Resource Recovery Agency, 2005 Annual Report at 1-2. The Association is a nonprofit association composed of hundreds of members representing local entities that manage waste throughout New York state, including waste management authorities like OCRRA and DCRRA as well as individual counties, towns, and districts.

Like respondents and many other local governmental bodies, moreover, Onondaga and Dutchess Counties have adopted flow-control ordinances that are substantially identical to the one attacked in this litigation.[2] Flow control, by channeling local waste to a designated local facility, permits local communities to generate waste-disposal fees sufficient to subsidize programs—particularly recycling, waste reduction, conversion of waste to energy, and household hazardous waste disposal—that would not otherwise be economically sustainable. If the Court strikes down the Oneida-Herkimer ordinances, the efforts of Onondaga and Dutchess Counties, and others like them, to encourage recycling, reduce waste generation, and practice environmentally sound waste disposal could fall with them, to the immediate and long-term detriment of the health and safety of their citizenry.

---

[2] Dutchess County's flow-control ordinance, unlike the Oneida, Herkimer, and Onondaga ordinances, applies by its terms to both local and non-local waste. Dutchess County, however, ceased to enforce its ordinance following this Court's decision in *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383 (1994), and it does not defend in this proceeding the portion of its ordinance that applies to non-local waste.

STATEMENT

The community ordinances at issue here are the centerpiece of the Counties' comprehensive effort to responsibly manage the disposal of locally generated solid waste. Although local communities have both the right and the obligation to manage their own waste in the public interest, the Counties have chosen to regulate only one element—initial consolidation and cleansing—of a waste management process that starts at curbside and may end at a landfill hundreds of miles away.

The ordinances provide that all waste placed at curbside "shall be delivered" to a facility designated by the county or the Authority. Pet. App. 118a-130a (Oneida County ordinance), 131a-143a (Herkimer County ordinance). The designated facilities in Oneida and Herkimer Counties are owned by respondent Oneida-Herkimer Solid Waste Management Authority, a public entity. J.A. 285a-286a. Private contractors may pick up waste at curbside and deliver it to the transfer facilities; private contractors may pick up waste from the transfer facilities and haul it away. Thus, much of the waste management business in the Counties remains in the hands of private enterprise.

The flow control laws do exactly what their name suggests: they allow the Counties to control the flow of their own solid waste and manage its disposal consistently with the health, safety, and welfare of the public. The basic purpose of flow control is the *cleansing of the waste stream*. The public processing facilities separate the waste into its constituent elements—recyclables, compost, electronic equipment and batteries, household hazardous materials, and so on—to minimize the amount of waste that ends up deposited in landfills, to reduce the quantity of household hazard material in that waste, and to derive such utility from the waste as is possible by recycling, energy generation, and similar processes. The waste that emerges from the flow-control process is cleaner, safer, and less voluminous than the waste that enters it.

Flow control also serves to fund the Counties' basic waste management efforts, which, it bears emphasis, consist of a great deal more than simple waste disposal. The public facilities charge "tipping fees" for waste disposal that help to fund the typically unprofitable activities of recycling, waste reduction, composting, household hazardous waste management, and similar measures that are at the core of the Counties' responsibility for the health and safety of their environments and their people.

Petitioners are commercial waste haulers who would prefer to dump the Counties' waste at commercial out-of-state landfills that are able to offer lower "tipping fees" because they do not fund the recycling, waste reduction, and similar public benefits offered by the Counties. Petitioners argue, in effect, that this Court's decisions construing the "negative" or "dormant" aspect of the federal Commerce Clause elevates the parochial self-interest of a few private trash haulers over local communities' authority, within their police powers, to manage their own solid waste for the public good.

SUMMARY OF ARGUMENT

Petitioners' challenge to the Counties' flow control laws is in effect a challenge to local waste management itself, and to the established constitutional commitment to local authority over community health, safety, and welfare. The principles espoused by petitioners would enlarge the dormant Commerce Clause in a way that would impair state and local efforts at the heart of the police power. Such an enlargement is neither called for nor permitted by this Court's precedents, and should be rejected.

At the heart of this dispute is what petitioners rightly call the "public/private distinction": the notion, adopted by the Court of Appeals, that local regulations favoring a *public* entity merit less onerous Commerce Clause scrutiny than similar regulations favoring *private* enterprise—particularly when the public entity is itself exercising a traditional police power.

I. There is no question that public waste facilities differ significantly from their commercial counterparts. As we will demonstrate, public waste-management facilities exist for different purposes than, and conduct their operations differently from, for-profit private facilities. Indeed, unlike private facilities, public waste management facilities exist as a result of the local governments' police power, and are themselves exercising that same power.

In this context, moreover, flow control ordinances are necessary to control a classic "free rider" problem. Sound waste management constitutes a "public good" in the sense that it produces long-term benefits to the community that far exceed the short-term benefit to any individual. (At a minimum, local governments can rationally believe that to be true.) The creation of such a public good also creates significant costs, however, which individuals have a strong incentive to escape if they can—thereby taking a "free ride" on the costs and investments made by others.

Flow control ordinances like those at issue here help to control free-riding behavior and thereby ensure that everyone in the community pays her fair share. They achieve that result by requiring that all trash be processed at a central, publicly operated facility, where the local government can ensure that every hauler—and by extension all of their customers—both pays the proper fee and disposes of local waste in a safe and environmentally protective way.

II. The pertinent question is therefore whether, in conducting dormant Commerce Clause analysis, the differences between public and private facilities are *constitutionally* relevant. On that fundamental issue, the Second Circuit was correct. Far from being "formalistic" or "superficial," as petitioners dismissively claim, the public/private distinction drawn by the Second Circuit is of clear constitutional importance. Indeed, long-settled principles of constitutional law lead inexorably to the conclu-

sion that where, as here, the regulation at issue is a function of core local police powers, and benefits only a public entity exercising those powers, the public/private distinction is not only legitimate, but constitutionally *required.*

Under settled principles, local laws enacted pursuant to traditional police powers—those relating to the public health, safety, and welfare—receive greater deference than other local regulations. *Cipollene* v. *Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); see also *Bates* v. *Dow Agrosciences*, 544 U.S. 431, 449 (2005); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Napier* v. *Atlantic Coast Line R. Co.*, 272 U.S. 605, 611 (1926). Because the ordinances challenged here address the traditionally local function of waste management, and because they protect the health, safety, and welfare of the local community, they are expressions of the police power, and as such they command constitutional deference unavailable to purely economic or commercial regulation.

That a local regulation is enacted pursuant to the police power does not, of course, remove that regulation from the operation of the Commerce Clause. Our argument is a very limited one. We maintain, simply, that where a local regulation embodies traditional police powers, and that regulation confers an "advantage" *only* upon a public entity acting in furtherance of those powers, that regulation is inherently nondiscriminatory for purposes of dormant Commerce Clause analysis.

Because such a regulation is nondiscriminatory, the appropriate vehicle for determining its validity is the *Pike* balancing test. See *Carbone*, 511 U.S. at 390. In the circumstances presented here—where the District Court made extensive factual findings and concluded that the challenged ordinances imposed no burden on interstate commerce, and where the local benefits conferred by the ordinances are closely related to the health, safety, and welfare concerns that justify their enactment—there is no

basis for invalidating the regulations. The decision of the Court of Appeals should be affirmed under *Pike*.

ARGUMENT

The Commerce Clause and the police power have coexisted since the Founding. The tension between the national aspirations of the one and the local traditions of the other is the tension inherent in dual sovereignty itself. Yet petitioners' position would enlarge the dormant Commerce Clause to unprecedented scope and invasiveness, and would permit federal power to intrude upon what have always been, and should remain, intimately local concerns.

The Constitution requires a more delicate balance. Indeed, the principle announced by this Court decades ago is no less true today:

> This distinction between the power of the State to shelter its *people* from menaces to their health or safety and from fraud, even where those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce *for their economic advantage*, is one deeply rooted in both our history and our law.

H.P. Hood & Sons v. *DuMond*, 336 U.S. 525, 533 (1949) (emphasis added). Where, as here, a local ordinance attempts to benefit, not private economic interests, but a public entity that itself exercises the police power, it poses no threat to the principles underlying the dormant Commerce Clause, and—absent evidence of any burden on interstate commerce—should be upheld.

I. FLOW CONTROL ORDINANCES FALL WELL WITHIN LOCAL GOVERNMENTS' POLICE POWER.

The Constitution allows the States "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."

Gonzales v. *Oregon*, 126 S. Ct. 904, 923 (2006) (quotations omitted). As shown below, waste management and flow control—like police protection, fire protection, and sanitation—are intimately related to the public health and safety, and thus are within state and local governments' police power.

A. Sound Waste Management Is An Important Health And Safety Issue And Therefore Falls Squarely Within The Police Power Of State And Local Government.

1. For more than a century, this Court has recognized that municipal waste management is a local responsibility within the police power. In *California Reduction Co.* v. *Sanitary Reduction Works*, 199 U.S. 306 (1905), for example, the Court addressed a constitutional challenge to a San Francisco waste-management regulation that forbade any person to "dump . . . within the city and county, any" local waste, requiring instead that such waste be delivered to a designated disposal facility. *Id.* at 308. The Court upheld the ordinance against constitutional challenge as a valid exercise of the city's police powers. Noting that the city enacted the ordinance "to prevent [waste] from being deposited" within the city "to the prejudice of the public health," *id.* at 319, the Court acknowledged the constitutional respect that courts owe to exercises of the police power:

> [I]t is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community."

Ibid. (citations omitted).

The same year, in *Gardner* v. *Michigan*, 199 U.S. 325 (1905), the Court upheld a Detroit regulation requiring local residents to place their garbage in approved sealed containers, to be picked up and disposed of by a designated

vendor. The Court reaffirmed its view that "it was a controlling obligation of the city, which it could not properly ignore, to protect the health of its people in all lawful ways having relation to that object," and that if, in the city's judgment, "the presence of garbage and refuse in the city . . . would endanger the public health by causing the spread of disease, then it could rightfully require such garbage and refuse to be removed and disposed of." *Id.* at 332-33. See also *Hutchinson* v. *City of Valdosta*, 227 U.S. 303, 308 (1913) (noting that "[i]t is the commonest exercise of the police power of a State or city to provide for a system of sewers, and to compel property owners to connect therewith").

In short, it is now firmly established that local waste-management regulations are a proper function of the police power. *See, e.g., North American Cold Storage Co.* v. *City of Chicago*, 211 U.S. 306, 315 (1908) (upholding an ordinance authorizing seizure of spoiled and unwholesome foodstuffs); *IESI AR Corp.* v. *Northwest Arkansas Regional Solid Waste Mgmt. Dist.*, 433 F.3d 600, 607 (8th Cir. 2006) (noting that "[e]nsuring adequate waste disposal resources is a valid exercise of the state's police power to protect public health"); *Maharg, Inc.* v. *Van Wert Solid Waste Mgmt. Dist.*, 249 F.3d 544, 566 (6th Cir. 2001); *On the Green Apartments, LLC* v. *City of Tacoma*, 241 F.3d 1235, 1238 (9th Cir. 2001); *Southern Disposal, Inc.* v. *Texas Waste Mgmt.*, 161 F.3d 1259, 1264 (10th Cir. 1998); *Massachusetts* v. *Dep't of Transp.*, 93 F.3d 890, 894 (D.C. Cir. 1996); *Harvey & Harvey, Inc.* v. *County of Chester*, 68 F.3d 788, 803 (3d Cir. 1995).

2. Given the settled state of the law on this point, it is surprising that petitioners ignore the police power entirely, and relegate their discussion of both *California Reduction* and *Gardner* to a footnote that dismisses them as irrelevant because "neither of these two cases involved interstate commerce in waste." Pet. Br. 48 n. 16. It is true that neither case invoked the Commerce Clause, but both cases *did* involve "interstate commerce in waste" as peti-

tioners themselves define it.[3] More importantly, petitioners' attempted distinction does not undermine the conclusion in these and other decisions that when local governments manage waste created within their borders, they are acting pursuant to their traditional police powers.

It is also true that the public health and safety interests implicated by waste management have evolved since *California Reduction*. Modern waste management is no longer primarily about *dumping* garbage. And today, the nineteenth-century need for basic disposal services is but one of many waste management considerations in a technologically advanced, highly developed society. Thus, as Congress has recognized, modern waste management programs must satisfy much broader, but no less urgent, needs: the need to engage in "careful planning and management" to mitigate the threat posed by waste to "human health and the environment"; the need to encourage recycling to "reduce the dependence of the United States on foreign resources"; and to develop alternate energy sources for public and private consumption in order to reduce our dependence upon" fossil fuels. 42 U.S.C. § 6901(b) (stating Congressional findings relating to the Resource Conservation and Recovery Act).

To fulfill these missions, respondents—like *amici* OCRRA and DCRRA and many other local waste management agencies around the Nation—offer a comprehensive waste-management program that includes recycling,

---

[3] Petitioners claim that "[w]hen in-state generators hire commercial haulers to remove their waste, the waste enters interstate commerce." Pet. Br. 49. As in this case, the waste management systems at issue in both *California Reduction* and *Gardner* relied upon commercial haulers, or at least private parties, to conduct curbside waste removal, and therefore fall well within petitioners' own definition of "interstate commerce in waste." See *California Reduction*, 199 U.S. at 307; *Gardner*, 199 U.S. at 328.

conversion of waste to energy, composting, and household hazardous waste disposal in addition to basic trash disposal. [4] But again, the fact that these services differ from or go beyond the waste management services at issue in *California Reduction* and its progeny does not undermine the conclusion that those services fall well within the traditional police power recognized in those decisions.

B. Flow Control Is Essential To Prevent "Free Riding" In The Recycling, Waste Reduction, And Other Waste-Related Environmental Programs Carried Out By Local Communities Pursuant To Their Police Power.

The many public benefits of a comprehensive waste management program would be difficult or impossible to achieve without flow control. The economics of solid waste, and certain aspects of the financing of waste management, make it very unlikely that unregulated markets will create the "public good" of environmentally responsible waste management. Flow control is the community's legitimate means, acting within its police power, of creating that public good and preventing individual consumers and waste haulers from free-riding on the community's efforts.

Petitioners' position, by contrast, amounts to little more than a claim that the Commerce Clause grants them and their customers a constitutional license to avoid paying their fair share of the cost of a basic public service—a claim that, if extended to other traditional local services, would eviscerate local government.

1. All the services provided by public waste authorities like OCRRA, DCRRA, and the respondent authority—

---

[4] There is some variation in the services offered by different waste management authorities. DCRRA, for example, does not offer composting; respondents no longer offer waste-to-energy conversion.

except, in some cases, basic trash disposal—are unprofitable. The cleansing of the waste stream that is a primary function of sound municipal waste management is expensive and burdensome. The most environmentally critical waste services—like recycling, composting, and household hazardous waste disposal—are typically provided free of charge or at a nominal fee, to encourage maximal use by citizens. Individual consumers, left to their own devices, are very unlikely to pay extra for these services, even though consumers in the aggregate—which is to say, the public—benefit enormously from them. See New Hampshire Dep't of Environmental Services, "The Cost of Flow Control": Critical Review of the National Economic Research Associates Analysis (May 1995) Commissioned By Browning-Ferris Industries, p.1 (November 27, 1995) ("New Hampshire Flow Control Report"). In an unregulated market there would likely be no recycling, no waste-reduction programs, no waste-to-energy conversion, and no household hazardous waste disposal—and certainly no systematic program implementing all these services.

These efforts thus exemplify a classic "public good" problem well recognized in economics. *See, e.g.*, Paul A. Samuelson and William D. Norhaus, *Economics* at 370 (18th ed. 2005). They bring significant long-term benefits to the entire community, while (in the considered judgment of many local governments) their absence would cause the community to bear significant long-term costs and risks. *Ibid.* Such efforts, therefore, create a "public good"—something that is of greater value to the entire community over the long term than it is to each community member in the short run. *Ibid.* (defining "public good" as a good "whose benefits are indivisibly spread among the entire community, whether or not individuals desire to purchase the public good").

2. The flow-control regulations at issue here represent the community's attempt to solve this fundamental problem. By requiring all local waste—and only local waste—to be delivered to a designated public transfer facility, the

regulations permit the county to charge "tipping" fees sufficient to finance *both* basic waste disposal services *and* the recycling, waste reduction, composting, and similar programs necessary to meet the local community's waste management needs. See OCRRA 2005 Annual Report at 4.

To be sure, flow control is just one element—albeit an important one—in what is accurately characterized as a broad public-private partnership in local waste management. As both respondents and other *amici* have pointed out, the Counties could, acting within their police power, choose to displace private enterprise throughout the waste management process. Instead, they have pursued a more modest approach, regulating only where necessary and leaving the great majority of the business of waste management to the private sector.

Flow control, moreover, is the *only* regulatory solution that permits communities simultaneously to achieve both goals of public waste management: assurance that local waste will be disposed of responsibly, and funding for disposal alternatives like recycling, composting, and household hazardous waste removal. Taxation could provide funding for responsible waste management, but would do nothing to ensure that local waste is in fact managed responsibly. Substantive regulations could seek to ensure responsible conduct by citizens and private waste haulers, but would provide no funding for unprofitable—but publicly b[illegible]cial—programs. Flow control, by contrast, achieve[illegible] these interests efficiently and effectively.

3. This effort to finance the provision of this public good by relying largely upon the private sector, however, creates a closely related problem that is equally well-recognized in economics: the "free rider" problem. That problem arises because any private actor has a strong incentive to escape, if possible, the costs that others pay to finance the public good. See, *e.g.*, Joseph Stiglitz, *Public Sector Economics* at 131 (3d. ed. 2000). That is why flow

control is so important in this context: it prevents some customers—mainly large producers and haulers of waste—from "free riding" on the costs paid by the rest of the community to enjoy the environmental benefits of recycling, conservation, and safe disposal of household hazardous waste.

This point is confirmed by petitioners' own acknowledgment that "if permitted to do so, they could dispose of waste they collect in Oneida and Herkimer Counties at out-of-state facilities" at significantly lower prices than the counties charge (Pet. Br. 5). Assuming this is true, it does not offer a meaningful comparison, because the lower prices charged by those unnamed "out-of-state facilities" reflect no expenses save those of basic trash disposal. See New Hampshire Flow Control Report at 1. The higher fees charged by Oneida-Herkimer's transfer facilities, like OCRRA's, incorporate the costs of the full range of modern waste-management services—services that the people of Oneida, Herkimer, and Onondaga Counties have concluded are in the public interest.

Like any business seeking to maximize profits, the haulers—and by extension their customers—would prefer not to pay for those services. They would prefer to be "free riders." They are situated no differently, however, from another citizen who wishes not to pay permit or license fees that finance important functions of local government; or yet another citizen who would prefer not to subsidize the maintenance of a local police force, or fire department, or sewer authority. That private services might be available to serve a particular need at lower cost does not create a constitutional right to use those services in violation of local law—at least where, as here, the local law is a proper expression of valid police powers.

Indeed, the haulers or their customers could presumably dispose of their waste in a variety of ways that would achieve substantial savings, if Oneida and Herkimer Counties decided to look the other way. But the Counties

have an affirmative obligation to manage their own waste, see *Gardner*, 199 U.S. at 332, and they have chosen to do so, not by dumping trash at the cheapest possible price, but by creating an integrated system of waste management that serves a wide array of valid, waste-related goals. As shown below, nothing in this Court's jurisprudence requires, or even permits, the application of the dormant Commerce Clause to run roughshod over local police power in the manner that petitioners suggest.

II. WHERE A COMMUNITY, ACTING WITHIN ITS POLICE POWER, ENACTS A LAW DIRECTING LOCAL TRASH TO A COMMUNITY-OPERATED FACILITY THAT ITSELF EXERCISES THE POLICE POWER, SUCH A LAW DOES NOT VIOLATE THE COMMERCE CLAUSE.

This Court's decisions recognize that the Commerce Clause exists to facilitate the existence of a national common market in goods and services. To that end, it has been held to prohibit both local laws that "discriminate" against interstate commerce and otherwise neutral laws that impose "excessive burdens" on that commerce. *General Motors Corp.* v. *Tracy*, 519 U.S. 278, 287 (1997). As we will explain, however, the laws at issue here—which regulate a core police-power activity and favor only a public entity that is itself acting in furtherance of that police-power activity— are not "discriminatory" for purposes of the dormant Commerce Clause. And because the laws are not discriminatory, they must be upheld inasmuch as there is no evidence that the ordinances impose *any* genuine burden on interstate commerce.

A. Because Such A Law Benefits Only A Public Entity Carrying Out A Core Police Power Function And Regulates Only Local Waste, It Does Not "Discriminate" Against Interstate Commerce.

This Court has held that even a necessary local police power regulation may violate the dormant Commerce

Clause if it "discriminates" against interstate commerce. *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978). It is clear, for example, that a local regulation requiring *all* waste entering the county—including out-of-state waste—to be plucked from the stream of commerce and deposited in a local facility would discriminate against interstate commerce and be subject to strict scrutiny. See *Carbone*, 511 U.S. at 390. Similarly, a local regulation requiring haulers to deposit waste at a designated local commercial facility would also face strict scrutiny if the commercial facility were favored solely because of its local provenance. See *ibid.* The mere presence of a police power interest, in other words, does not trump the dormant Commerce Clause's core prohibition against laws that discriminate against interstate commerce.

A recognition that the police power does not automatically vitiate the Commerce Clause's proscription against "discrimination" does not, however, answer the question posed here: whether a regulation favoring a public entity, rather than a commercial one, is "discriminatory" for purposes of Commerce Clause analysis. This Court's decisions strongly indicate that it is not, and that local laws that benefit public entities, rather than conferring commercial advantage on private entities, should receive the less onerous scrutiny applied to non-discriminatory laws under the *Pike* balancing test.

1. Because of the government's police power, there is a constitutionally significant difference between a law that favors a local government and one that favors local private enterprise.

The core prohibition of the dormant Commerce Clause doctrine is discrimination against commerce: the doctrine "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys, Inc.* v. *Dep't of Environmental Quality of Oregon*, 511 U.S. 93, 98 (1994). "Discrimina-

tion," by definition, involves "differential treatment" of "substantially similar entities." *General Motors Corp.* v. *Tracy*, 519 U.S. 278, 298-99 (1997). State restrictions on commerce that discriminate between similarly situated entities are "virtually per se invalid." *Oregon Waste Sys.*, 511 U.S. at 99.

This Court, however, has consistently construed "discrimination," for Commerce Clause purposes, to encompass "differential treatment of in-state and out-of-state *economic interests* that benefits the former and burdens the latter." *Id.* at 99; see also *New Energy Co. of Ind.* v. *Limbach*, 486 U.S. 269, 273-74 (1988). The term "economic interests," in turn, has been construed to mean *private* economic interests, that is, commercial interests. *See, e.g., Carbone*, 511 U.S. at 392 (noting that "[d]iscrimination against interstate commerce *in favor of local business or investment* is [virtually] per se invalid") (emphasis added); *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Res.*, 504 U.S. 353, 361 (1992) (striking down statute because it protected "local waste producers . . . from competition from out-of-state waste producers"); *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 354 (1951) (striking down statute as discriminatory because it "protect[ed] a major local industry against competition from without the State").

The heart of petitioners' argument is that the public/private distinction consistently, if implicitly, drawn by this Court and relied upon by the Second Circuit lacks constitutional justification—that Commerce Clause discrimination analysis admits of no distinction between private business and public enterprise. Put another way, petitioners claim that the *public* waste authority "favored" by the Oneida-Herkimer ordinances is "similarly situated" to out-of-state *commercial* waste processing facilities for purposes of Commerce Clause differential-treatment analysis. See *General Motors Corp.*, 519 U.S. at 298-99.

Petitioners are mistaken. As demonstrated in detail above, public waste management authorities and private waste processors are not "similarly situated" for a host of factual reasons—most notably, because both their purposes and their operations differ significantly from those of their commercial counterparts, and because governmental entities, unlike private ones, have a legitimate role in mitigating "public good" and "free-rider" problems.

More important, however, and in part for these reasons, the Authority and its alleged private competitors are not "similarly situated" as a matter of constitutional law. See *id.* (noting that "the threshold question" in dormant Commerce Clause analysis is "whether the companies are similarly situated *for constitutional purposes*") (emphasis added). A public waste authority, like a fire department or police department, is an agent of local government, which in turn is an agent of the people as a whole. *See, e.g.*, Locke, *Second Treatise on Government* s. 240 (1690) (describing government as the "trustee" or "deputy" of the people); *The Federalist* No. 46 (James Madison) (Clinton Rossiter ed. 1961) (describing state governments as "agents and trustees of the people"). Moreover, as explained above, public waste management authorities exercise a portion of the police power that the people have delegated to their government—a power that the Tenth Amendment recognizes as being "reserved . . . to the people." U.S. Const. Amend. X. For both of these reasons, public waste management agencies and facilities enjoy a constitutional status fundamentally different from that of an individual or private company. To treat such authorities as if they were no different from commercial businesses would be to ignore the constitutional commitment to local sovereignty and reserved powers, and would skew the constitutional balance heavily against local government.

This Court has recognized the constitutional importance of the police power in the dormant Commerce Clause context as recently as last term. In *American Trucking*

Association v. *Michigan Public Service Commission*, 545 U.S. 429 (2005), the Court upheld against dormant Commerce Clause challenge a Michigan law imposing an annual fee on intrastate trucking. In upholding the regulation, the Court explained that the law did not violate the dormant Commerce Clause because it was merely "an unobjectionable exercise of the State's police power." *Id.* at 434.

The constitutional significance of the police power is also well established in the Court's active Commerce Clause and preemption jurisprudence, in which it is well established that "the historic police powers of the states [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollene,*, 505 U.S. at 516; see also *Bates*, 544 U.S. at 449; *Rice*, 331 U.S. at 230; *Napier*, 272 U.S. at 611. These decisions demonstrate that, even where Congress has affirmatively legislated on a subject within the scope of traditional state police powers, those powers command constitutional respect, and may be superseded only in narrow circumstances. It would be strange indeed if traditional police powers received *less* constitutional deference where Congress has made *no* effort to preempt state authority—and in fact has indicated its strong support for local control of waste management. See 42 U.S.C. § 6901(a)(4) (stating Congressional finding that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies").

In this regard, it bears emphasis that actions taken pursuant to police powers are *not* automatically beyond Commerce Clause scrutiny. Rather, when a community takes local action within the scope of its traditional police powers, and that action confers no differential benefit except upon a public entity acting in furtherance of those powers, Commerce Clause scrutiny must account for the independent constitutional value of local authority. Put another way, police power regulations that do not benefit

local commercial interests are not "discriminatory" in any constitutionally relevant way.

Consideration of other police power regulations confirms the principle that when such regulations confer only public benefits, rather than commercial advantage, they are not "discriminatory" as a matter of law. Consider, for example, a local law requiring that wild animals wandering within city limits be captured by the municipal animal-control department. Such a law theoretically disadvantages out-of-state wranglers who might otherwise compete for local business. But it would be strange to describe the law as "discriminatory" in any meaningful way. The same is true for any traditional community service: the maintenance of a local police force, for example, displaces private security companies; municipal water and sewer authorities displace commercial providers of sanitation services. Nevertheless, the authority of our cities and towns to provide their citizens with police protection and basic sanitation, rather than "outsourcing" those functions to private companies, has never been subjected to strict scrutiny under the dormant Commerce Clause.

For all these reasons, affirming the public/private distinction employed by the court below will do no more—and no less—than confirm what we have always known: that states and localities can police their streets, regulate fire hazards, provide sewage and sanitation, and conduct trash management in the public interest without running afoul of the Constitution, so long as they do so without impermissibly favoring local private interests at the expense of out-of-state commercial interests.

2. Because the challenged laws regulate only local waste, they operate at the heart of the Counties' police power jurisdiction, and are distinguishable from the much broader regulation struck down in *Carbone*.

The principles we advocate here are also consistent with this Court's decision in *Carbone*. Although the regu-

lation struck down in *Carbone*, like the one at issue here, was enacted pursuant to the town's police powers, it differed in two crucial respects: first, as discussed, the *Carbone* regulation favored a private commercial entity, rather than a public noncommercial one; and second, the *Carbone* regulation applied to "all nonhazardous solid waste within the town," including "waste generated outside [the town] and brought in." *Carbone*, 511 U.S. at 387. In other words, the regulation operated to "capture" waste generated elsewhere—including in other states—and remove it from the stream of commerce. The majority opinion noted that feature of the ordinance no fewer than five times.[5] In fact, the very waste that prompted the original lawsuit in *Carbone*—seven tractor-trailers of nonrecyclable waste from Carbone's facility that were stopped by local police on their way out of town—contained waste "originating both within and without the town" that was "destined for disposal sites in Illinois, Indiana, West Virginia, and Florida." *Id.* at 388.

When a regulation creates the specter of the local sheriff intercepting out-of-state trucks laden with foreign goods, plucking them from the stream of commerce and directing them forcibly to the local processing facility, it seems beyond dispute that the regulation poses precisely the kind of economic barrier to interstate commerce that is likely to incite the "regional jealousies" that the Founders enacted the Commerce Clause to proscribe. *See, e.g.*, *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935) (noting that "a chief occasion of the commerce clauses was the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation"). In light of its application—theoretical and actual—to interstate waste, the regulation in *Carbone* discriminated against interstate commerce in a way that the Oneida-Herkimer regulations do not.

---

[5] See *id.* at 387, 388, 389, and 390.

Specifically, those ordinances regulate only the disposal of waste that is generated by the local community. See Section 2(c) of Herkimer County Local Law, Introductory No. 1—1990 (limiting application of the ordinance to materials placed at the roadside for collection). For that reason, they operate at the core of the counties' police power authority—and obligation—to manage their own waste. Locally produced waste is squarely within the "jurisdictional bounds" of the counties' police power, in a way that foreign waste is not. *Carbone*, 511 U.S. at 393.

3. Upholding the challenged ordinances on police-power grounds is entirely consistent with this Court's "local processing" cases.

The presence of a strong police power rationale for the laws challenged here also distinguishes the present case from the many "local processing" cases relied on by petitioners. Pet. Br. 27-33. Those cases all involve quintessentially protectionist economic legislation enacted outside the scope of traditional police powers. None of the goods involved in those cases—including shrimp (*Toomer* v. *Witsell*, 334 U.S. 385 (1948)), timber (*South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82 (1984)), cement (*Reeve, Inc.* v. *Stake*, 447 U.S. 429 (1980)), and oysters (*Johnson* v. *Haydel*, 278 U.S. 16 (1928))—is a traditional responsibility of local government or a matter of community health, safety, and welfare.[6] The "local processing" cases therefore simply do not present the central issue confronting the Court in this case: how to reconcile the dormant Commerce Clause with the independent constitutional commitment to strong local police powers. Instead, these

---

[6] Another processing case, *Minnesota* v. *Barber*, involved meat inspections—arguably a police power activity—but, as in *Carbone*, the challenged regulation applied to both domestic and out-of-state meats, and so extended beyond the state's police power jurisdiction. 136 U.S. 313 (1890).

cases involved what were essentially economic regulations intended to protect local commerce—precisely the kind of discriminatory regulations that this Court has held require strict Commerce Clause scrutiny—and are readily distinguishable from the waste-management regulations at issue here.

To be sure, both waste and the process of its disposal are "commerce" for constitutional purposes. See *Fort Gratiot Sanitary Landfill*, 504 U.S. at 359 (recognizing that waste is an article of commerce) and *Carbone*, 511 U.S. at 391 (noting that "the service of processing and disposing" of waste is commerce). To show that local waste and its disposal involve commerce, however, is not to establish that local waste and its disposal involve *merely* commerce, and are imbued with no special constitutional significance. The role of the police power in waste management, and its status as a traditionally local function, make it different in kind from merely economic activities, and call for different and more deferential constitutional analysis.

Neither *Carbone* nor the Court's other "local processing" cases, therefore, conflicts with the narrow principle we urge here: that where a local regulation embodies traditional police powers, and that regulation confers an "advantage" *only* upon a public entity acting in furtherance of those powers, that regulation does not discriminate against interstate commerce.

B. Such A Law Does Not Pose An Undue Burden On Interstate Commerce Under The *Pike* Balancing Approach.

Because the ordinances at issue here do not discriminate against interstate commerce, the appropriate mechanism for evaluating their validity is the balancing test in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). *Carbone*, 511 U.S. at 390.

The *Pike* test asks "whether the ordinance imposes a burden on interstate commerce that is 'clearly excessive in relation to the putative local benefits.'" *Ibid.* (quoting *Pike*, 397 U.S. at 142). Because there is no evidence that the ordinances at issue impose any burden on interstate commerce, and because the benefits they confer on Oneida and Herkimer Counties are real and significant, the ordinances do not excessively burden commerce.

1. The District Court found as fact that the challenged ordinances imposed no burden on interstate commerce, and petitioners offer no basis for overturning that conclusion.

The District Court found as fact that the challenged ordinances impose no cognizable burden on interstate commerce. Pet. App. 74a. And before this Court, petitioners identify no evidence sufficient to bear their burden of contradicting the District Court's conclusion.

In lieu of factual evidence of any kind, they offer a series of *ipse dixit* statements suggesting, without evidentiary support, that the ordinances "impose[ ] a severe burden on interstate commerce that cannot be justified by the local interests at issue here." Pet. Br. 41. But petitioners never identify what the alleged "burden" on interstate commerce actually is. They identify no commercial markets that are harmed, and make no effort to quantify any such (unalleged) harms. To be sure, in the proceedings below they alleged a potential diminution in the general commerce of solid waste. But they do not repeat that assertion before this Court, and it is not clear that petitioners have *any* factual basis, of record or otherwise, for their repeated assertions that the burden on commerce imposed by these ordinances is "severe."

Even if petitioners offered any plausible argument suggesting that the District Court's findings were erroneous, this Court would be a poor venue in which to resolve a factual dispute: because this Court is "[a] court of law . . . rather than a court for correction of errors in fact finding,"

it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949); see also *Southern Pac. Co.* v. *Arizona ex rel Sullivan*, 325 U.S. 761, 771 (1945) (declining to overturn state court factual findings where those findings, "although challenged in some particulars," were "supported by evidence").

In any event, faced with a factual record that is overwhelmingly against them, petitioners attempt to recast the question of the ordinances' burden on commerce as a question of law. Their *Pike* arguments rely almost entirely on a misreading of Justice O'Connor's concurring opinion in *Carbone*, in which she concluded that the ordinance challenged there was nondiscriminatory but failed the *Pike* test. See *Carbone*, 511 U.S. at 401 (O'Connor, J., concurring).

Petitioners' reliance on *Carbone* (and on an analysis joined by no other Justice) is misplaced. *Carbone* came before this Court on summary judgment. See *id.* at 388. The Court therefore lacked any factual information on which to base a conclusion of "excessive burden," and, indeed, it drew no such conclusion. Because the Court concluded that the *Carbone* ordinance was discriminatory, it did not consider whether it also posed an "excessive burden" on interstate commerce, and we cannot know how the Court would have resolved that issue—or if it would have chosen to resolve the issue at all in the absence of a factual record.

In addition, petitioners' characterization of Justice O'Connor's concurrence ignores the rationale for her conclusion that the Clarkstown ordinance failed *Pike* balancing. In reaching that conclusion, the concurrence focuses almost entirely on the extraterritoriality feature of the Clarkstown regulation, which forced even out-of-state waste to be brought to the facility of the favored local business. See *Carbone*, 511 U.S. at 406-07 (O'Connor, J.,

concurring) (discussing the specter of inconsistent local regulations governing the same waste).

We respectfully suggest that the one-Justice concurrence in *Carbone*, drawing its conclusions entirely from the briefs and without the benefit of any fact-finding, is too slender a reed on which to base a constitutional decision of the magnitude presented here, and that in any event the concurrence's reasoning is inapplicable on the facts of this case. Because petitioners have identified no other basis for their assertion that the ordinances impose a "severe" burden on interstate commerce, petitioners have presented no adequate basis for overturning the findings of the magistrate, District Court, and Court of Appeals.

2. Even if the issue of "excessive burden" is a question of law, petitioners' *Pike* analysis fails to conduct any meaningful balancing of burdens and benefits.

Even if petitioners' reliance on the *Carbone* concurrence were appropriate, their *Pike* balancing argument would fail on its own terms. *Pike* balancing "involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *Raymond Motor Transp., Inc.* v. *Rice*, 434 U.S. 429, 441 (1978). Petitioners' *Pike* analysis neglects to determine either the "extent" of the burden allegedly imposed by the ordinances or the "weight and nature" of the Counties' regulatory concern. See *ibid.* Instead, they simply lift the *Carbone* concurrence's *Pike* analysis and graft it, wholesale, onto this very different case.

Concluding without analysis that the burdens imposed by the ordinances are "severe" and "extreme," petitioners simply dismiss out of hand the offsetting benefits substantiated by the District Court—including the management of environmental liability issues and the financing of recycling efforts—calling them "spurious." Pet. Br. 43. In fact,

petitioners' discussion of the "putative local benefits" prong of the *Pike* test relies, not on authorities applying the *Pike* test, but on rulings and standards from *Carbone* and other cases in which the regulations were found to be discriminatory. Compare Pet. Br. 46 (asserting that the challenged ordinances fail *Pike* balancing by reference to pages 17-19 of the brief) with *id.* at 17-19 (discussing why the putative benefits of the *discriminatory* ordinance in *Carbone* were inadequate to survive *strict scrutiny*).

In short, petitioners' analysis turns *Pike* on its head and essentially makes *Pike* analysis an exercise in strict scrutiny. This ploy cannot, however, obscure the fact that local benefits that are inadequate to survive strict scrutiny may well be adequate to survive the lesser scrutiny afforded by *Pike* balancing. And petitioners fail to cite a single authority (other than the *Carbone* concurrence) for their assertion that the local benefits conferred by the Oneida-Herkimer ordinances are insufficient to survive *Pike* balancing. They therefore have offered no basis on which to overturn the Court of Appeals' decision.

3. Because the principal purpose of the flow-control laws here is the support of community health, safety, and welfare programs, the benefits they confer are more compelling than those in *Carbone*.

Moreover, there is no question that flow-control confers enormous benefits on the people of Oneida and Herkimer Counties.[7] As discussed in detail above, the ordinances

---

[7] Petitioners' assertion that the benefits are "minimal" is unsupported by their own brief, which discusses not whether the ordinances provide benefits, but only whether those benefits could be achieved in some other way—an inquiry that is relevant only to strict scrutiny, not *Pike* balancing. *See, e.g.*, Pet. Br. 46 (describing benefits as "minimal" and referring to pages 17-19) and 17-19 (discussing ordinances' benefits in terms of strict scrutiny).

enable the Counties to prevent "free riding" and thereby provide recycling, waste reduction, and similar programs that are not independently financially viable. By contrast, the *only* purpose of the flow-control regulation struck down in *Carbone* was to finance the construction of the private waste facility. *Carbone*, 511 U.S. at 393. This distinction is critical to appropriate *Pike* balancing.

1. First, it is important to remember that the Court in *Carbone* never addressed whether the avowed purpose of Clarkstown's flow-control ordinance was sufficient to outweigh the burdens imposed on interstate commerce. The *Carbone* Court concluded that the ordinance was discriminatory, and that the purpose was inadequate to survive the strict scrutiny given to discriminatory regulations. Only one Justice, writing only for herself, reached the *Pike* balancing issue. *Carbone* therefore provides no guidance on how the majority would have analyzed the facility financing purpose at issue in that case under *Pike* balancing.

Even if the *Carbone* concurrence provided useful guidance for *Pike* balancing in dormant Commerce Clause cases, it would have very limited value here, because respondents have offered different, and much more compelling, justifications for the challenged ordinances. The flow-control ordinance in *Carbone* was enacted simply to pay for the construction of the facility and ensure its profitability. There was no necessary relationship between the ordinance, its purpose, and the authority under which it was enacted. In other words, there is nothing about the construction of buildings that relates to the health, safety, and welfare of the community.

The ordinances at issue here, by contrast, represent the exercise of the police power for the furtherance of quintessentially public benefits. Moreover, the congruence of the ordinances' purposes and the police power authority invoked to enact them makes their benefits much more compelling, for dormant Commerce Clause purposes, than

the benefit conferred in *Carbone*. Because Commerce Clause analysis must acknowledge the existence of the countervailing constitutional value represented by the police power, it stands to reason that the more closely the "relative benefits" of a police power regulation adhere to core police power subjects, the more respect those benefits should receive in the constitutional balancing required by *Pike*.

As we have shown, petitioners have provided no evidentiary or theoretical basis for overturning the *Pike* balancing undertaken by the Court of Appeals and the District Court. That fact is sufficient to affirm the decision of the Second Circuit.

2. Even if petitioners had made a serious attempt at *Pike* balancing, they have failed to demonstrate that the burdens imposed by the ordinances on interstate commerce were "excessive" in relation to their benefits. To the contrary, basic constitutional principles suggest that where a flow control law reasonably furthers an exercise of the government's police power, and does not disadvantage out-of-state businesses, the law will rarely, if ever, be invalid under *Pike* analysis. Although the burdens imposed on interstate commerce by a law reasonably related to a traditional police power will vary from case to case, the "relative local benefits" of such a law should *always* be considered substantial out of respect for the constitutional role of the states and settled understandings of the constitutional status of the police power.

The role of the police power, in other words, is to create a *de facto* presumption of validity in the face of a dormant Commerce Clause challenge. Such a presumption already operates in the realm of the Court's preemption jurisprudence, see *Cipollene*, 505 U.S. at 516, and it would be entirely consistent with established constitutional principles to employ a similar presumption in the context of the dormant Commerce Clause. But the Court need not go so

far, given that petitioners have failed to provide any basis for questioning the Court of Appeals' *Pike* analysis.

* * * * *

This Court has long recognized that in "cases in which regulation of local matters may also operate as a regulation of commerce," it is necessary to perform a "reconciliation of the conflicting claims of state and national power." *Southern Pac. Co.*, 325 U.S. at 768-69. The precise way in which those claims are reconciled at the margins remains the subject of an enduring constitutional debate. The very nature of the inquiry, however, suggests an operative principle: where the legitimate claims of one sovereign are at their zenith, and the claims of the other at their nadir, the stronger claim must prevail. Accordingly, as the Second Circuit recognized, the proper "reconciliation" in this case is to uphold the local waste management ordinance.

CONCLUSION

The decision of the Second Circuit should be affirmed.

Respectfully submitted.

GENE C. SCHAERR
STEFFEN N. JOHNSON
GEOFFREY P. EATON
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000

BRUCE R. BRAUN
Counsel of Record
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

Counsel for Amici Curiae

DECEMBER 2006

No. 05-1345

In The

Supreme Court of the United States

UNITED HAULERS ASSOCIATION INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., and INGERSOLL PICKUP INC.,

Petitioners,

v.

ONEIDA HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, and COUNTY OF HERKIMER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICI CURIAE* ROCKLAND COALITION FOR DEMOCRACY & FREEDOM, and the ROCKLAND COUNTY CONSERVATION ASSOCIATION

MICHAEL D. DIEDERICH, JR.*
361 Route 210
Stony Point, NY 10980
(845) 942-0795

**Counsel of Record*
for Amicus Curiae

TABLE OF CONTENTS

STATEMENT OF INTEREST OF THE AMICUS CURIAE 1

RELEVANT FACTS 3

SUMMARY OF ARGUMENT 5

ARGUMENT 7

POINT I MONOPOLY PUBLIC CONTROL OF A COMMUNITY'S TRASH IS A CONSTITUTIONAL MEANS OF PROTECTING LOCALITIES THROUGHOUT THE NATION 7

A. The "Golden Rule" applied to municipal management of trash 7

B. The right of the Citizenry to monopoly public service over its trash 9

1. Public monopolies are designed for the public interest 9

2. Monopoly public control can include the private sector 11

3. Monopolistic public control of local waste does not implicate interstate commerce—*Clason v Indiana* 12

4. Entrepreneurial municipalities are entitled to become waste havens 13

5. Discriminatory governmental mischief is not protected—*Carbone & Philadelphia* 13

POINT II PUBLIC MANAGEMENT LOCAL TRASH DOES NOT IMPLICATE INTERSTATE COMMERCE 15

A. Waste is not an "article of commerce" 15

B. Reducing or eradicating waste does not impair commerce 16

C. Public sanitation trucks or private trucks make no constitutional difference 17

D. The trash collectors' possession of the local citizens' trash is a constructive bailment, with no claim of title 18

E. The public system properly includes the monopolistic "bottling" of the local citizenry's trash 20

POINT III FEDERALISM, THE TENTH AMENDMENT, AND THE GUARANTEE CLAUSE PROMISE DEMOCRACY OVER TRASH 20

A. Congress is without affirmative Commerce Clause power to prevent local public management of local waste 20

B. This Court implicitly recognized in *Carbone* that the citizenry can publicly manage waste 22

C. Democracy will suffer an arctic chill, if a Citizenry cannot govern its local concerns 23

CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935).....25

C & A Carbone v. Town of Clarkstown, 770 F.Supp.848 (S.D.N.Y. 1991) 13

C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994).....passim

California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 305 (1905).....8, 12, 16

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).....13, 14, 17, 18

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978).....25

Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources, 504 U.S. 353 (1992) 13, 17

Fry v. United States, 421 U.S. 542 (1975).....24

Harvey & Harvey, Inc. v. County of Chester, 68 F.3d 788 (3rd Cir. 1995), *cert. denied* 516 U.S. 1173 (1996).....12

Houlton Citizen's Coalition v. Town of Houlton, 175 F.3d 178, 184 (1st Cir. 1999).....12, 17, 18

Hybud Equip. Co. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981), *vacated*, 455 U.S. 931, *cert. denied*, 471 U.S. 1004 (1985).....8, 21

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).....11, 15, 16

National League of Cities v. Usery, 426 U.S. 833, 854 (1976).....24

National Solid Waste Management Association v. Daviess County, 434 F.3d 898 (6th Cir. 2006) 8

New York v. United States, 505 U.S. 144, 169 (1992).....24

Oregon Waste Services v. Department of Environmental Quality, 511 U.S. 93 (1994) 13

Parker v. Brown, 317 U.S. 341 (1943) 10, 13, 19, 20

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 11

Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951) 19

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) 10, 12

United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste, 261 F.3d 245, 257 (2d Cir. 2001) 4

United States v Lopez, 514 U.S. 549 (1995) 21, 22

United States v. Morrison, 529 U.S. 598 (2000) 21, 22

White v. Massachusetts Council of Constr. Employees, 460 U.S. 204 (1983) 11

Statutes

N.Y. Public Authority Law § 2049-ee(7) 10

Resource Conservation and Recovery Act ("RCRA") §§ 1001(a)(4), 42 U.S.C. §§ 6901 (a)(4) 9, 10, 16

Treatises

9 N.Y.JUR.2d, *Bailments & Chattel Leases*, §§ 5 & 27 20

SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW I: FRAMEWORKS, STANDARDS AND IMPLEMENTATION (2d ed. 2003) 11

TRIBE, AMERICAN CONSTITUTIONAL LAW 397 (2d ed. 1988) 24

TRIBE, AMERICAN CONSTITUTIONAL LAW (3d Ed. 2000) § 6-6, note 54 ..... 8, 25

Constitutional Provisions

Commerce Clause , U.S. Const. art. I, § 8, cl. 3 ..... passim

Guarantee Clause, U.S. Const. art. IV, § 4 ..... 20, 23

Tenth Amendment, U.S. Const.. ..... 9, 10, 20, 24

Other Authorities

Diederich, Does Garbage Have Standing?: Democracy, Flow Control and a Principled Constitutional Approach to Solid Waste Management, 11 PACE ENVT'L L. REV. 157 (Fall 1993).....passim

U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda For Action* 11 (Feb. 1989).....17

Wikipedia, The Free Encyclopedia, at http://en.wikipedia.org/wiki/Subsidiarity 11

WILLIAM RATHJE & CULLEN MURPHY, RUBBISH! THE ARCHAEOLOGY OF GARBAGE 9 (1992).....8

In The

SUPREME COURT OF THE UNITED STATES

No. 05-1345

UNITED HAULERS ASSOCIATION INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., and INGERSOLL PICKUP INC.,

Petitioners,

v.

ONEIDA HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, and COUNTY OF HERKIMER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR *AMICUS CURIAE* FEDERATION OF NEW YORK SOLID WASTE ASSOCIATIONS IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF THE AMICUS CURIAE

This *amicus curiae* brief is submitted on behalf of the Federation of New York Solid Waste Associations (hereinafter "Federation"). The Federation of New York Solid Waste Associations was formed ten years ago. The Federation's primary purpose is to conduct conferences, seminars, and training as well as to provide a united voice,

when possible, for legislative and policy issues that are consistent with the environmentally sound management of solid waste. The Federation's membership consists of three state-wide organizations and their members, including individuals from both the public and the private sector.

Many of the Federation's members are public employees involved with the management and regulation of their communities' solid waste, including long-term planning for environmentally sound, economical, and sensible management of municipal solid waste. They are thus responsible to the public they serve.

The Federation's individual members, as citizens, are members of the taxpaying, trash-generating public. They request the Court to consider and accept the "Golden Rule" as applied to solid waste management:

> "the local community should accept responsibility for managing its own community's solid waste; if the private sector is needed, employ it on an even-handed and non-discriminatory basis; and if the local community needs to reach out to the interstate waste service providers, allow these to perform their services without unfair interference."

The *Amicus* believe that public-spirited citizens from all States will agree with this "do unto others" approach. Professionals such as the Federation's members seek the best solutions to solid waste problems. If Oneida-Herkimer's system becomes the model for successful waste reduction, recycling and disposal, the Nation will benefit.

Because this Court's decision could have a profound effect upon principles of democracy, federalism and the environment, the Federation urges affirmance.[1]

---

[1] No portion of this brief was authored by counsel for a party, and no person or entity other than the *amicus curiae* or its members has made a monetary contribution to the preparation or submission of this brief. The Petitioner and Respondent have each consented to the filing of this brief

RELEVANT FACTS

The people of Oneida and Herkimer counties, through the public respondents, have democratically chosen to monopolize the management and disposal of their own citizens' solid waste. The State of New York, through state legislation, has expressly authorized this monopoly system of public service, and the Respondent Authority is created for this public purpose. The Oneida-Herkimer system, boiled to its essence, is as follows:

1. All waste (unwanted material) placed curbside by the local public becomes the responsibility of the system, and the public system is entitled to control it. The waste is thus "bottled up" within the Respondents' public system of solid waste management (the "Oneida-Herkimer system"). *See,* "'Bottled' Solid Waste and its Flow " diagram" at *Appendix* "A".

2. The curbside solid waste is collected ("bottled") by private haulers who sell their waste collection services to the local citizenry individually. These haulers are required, however, to keep the waste they collect within the bottle—as the government controls its citizens' waste under its monopolistic waste management system.

- Essentially, the Oneida-Herkimer system gives the local haulers a non-exclusive franchise for the collection of local solid waste. The Respondents could have used direct municipal collection with DPW sanitation trucks, or competitively awarded an exclusive franchisee for such trash collection within the public system area, or provide for free disposal for citizens' wastes. As shown in the annexed diagram, regardless of the form used—regulatory flow control, municipal collection, contract, exclusive franchise or "economic flow control"—the net result is that the local waste is controlled within the system, and

---

and their respective letters of consent have been filed with the Clerk of the Court.

"flows" to the designated facilities. *See*, "Forms of Flow Control" diagram at *Appendix* "B." Regulatory flow control, however, can best serve economic fairness and environmental interests.

3. The community's "bottled" local solid waste is then directed, via the flow control ordinances, through the neck of the bottle (the "bottleneck"[2]) to the Oneida-Herkimer citizens' public facilities for management and disposal. To the extent the community's solid waste can be completely disposed of locally, such as at the citizens' landfill or its recycling facilities (or if it still had one, a waste-to-energy facility), it has achieved a public interest objective mandated by New York and federal law.

4. To the extent the private sector has been employed to assist Respondents with their management of their community's local waste, there has never been favoritism. Any hauler from any State can compete for customers to collect local solid waste. As to disposal, and also its public infrastructure, if and when such services are needed (as has been the case in the past), any outside landfill or recycling plant operator, environmental educator, or material or parts supplier, or facility contractor can compete to provide goods, services or construction to Respondents. The annexed diagram depicts a comparison with other devices for directing waste flow, including the impermissible scheme used by the town in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). *See*, *Appendix* "C".

The Oneida-Herkimer system discriminates against no private sector vendors whatsoever. Nor is interstate commerce burdened, unless this Court deems waste itself as a protected article of commerce, something it declined to do in *Carbone*. *See, Appendix* "D".

---

[2] The "bottleneck" visualization by the court below in *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste*, 261 F.3d 245, 257 (2d Cir. 2001)("*United Haulers I*") was adopted from counsel's arguments.

SUMMARY OF ARGUMENT

Federal and state law allows the citizenry of Oneida and Herkimer counties, through their county government and State-created public benefit corporation, to monopolize the control and disposal of their own locally generated solid waste. The court below upheld this democratic principle, authorizing the citizenry, through the auspices of State, regional and local government, to "bottle up" locally generated waste into a public monopoly system, which monopoly system controls its citizens' waste, yet allows competition for local collection by haulers. The haulers are required to keep the trash within the system—the bottle—because the citizenry has the right to monopoly public service for its welfare and benefit.

This right to monopolize the processing and disposal of the citizenry's trash, by directing that local trash flow to the citizens' public facilities, paid for and maintained by the citizens' dollars, is a right which the citizens possess as a matter of self-governance and representative democracy. It is no different from creating a police or fire department, sewer district or public school system, to manage problems analogous to waste: crime, fire, sewage waste or illiteracy. The mere fact that the private sector may assist the local government in managing the local problems should not subject the public activity to dormant Commerce Clause scrutiny.

Yet Petitioners ask this Court to take its dormant Commerce Clause jurisprudence down an unprincipled and slippery slope, based upon the waste industry's purported right to ever increasing volumes of trash and profit. This is a path which, if taken, threatens our federalism, our democracy and our environment. The Constitution does not deny a local community the right to self-manage its own trash. This Court must not permit a collision between the Commerce Clause and bedrock constitutional principles of State sovereignty and democracy.

Your *amicus* requests that the Court apply the principled approach to solid waste management contained in counsel's law review article *Does Garbage Have Standing?: Democracy, Flow Control and a Principled Constitutional Approach to Solid Waste Management.*[3] Essentially, this approach applies the "Golden Rule" to garbage management—let the citizenry, through its representative government, seek to manage its own solid waste locally, such as through monopoly public service, but do not interfere with other communities' management if they choose to employ interstate waste service providers.

The respondent Oneida-Herkimer system is faithful to this principled approach. The Oneida-Herkimer system manages its citizens' solid waste locally to the maximum extent appropriate, and when the private sector is desired, it has been employed on a fair and non-discriminatory basis This principled approach to solid waste management adheres to federal environmental policy and this Court's jurisprudence. It is an approach suitable for international application.[4]

When State and local governments compete for the distinction of having the most environmentally sound and cost-effective solid waste management programs for their citizens' waste, this results in a cooperative and mutually beneficial "race to the top." On the other hand, granting the private waste industry the right to local citizens' trash is to put the "fox in charge of the henhouse." The likely result is an increase in "waste havens," excessive costs and environmental externalities to be borne by the public, and a "race to the bottom."

Because Respondents' constitutionally principled waste management results in no cognizable adverse affect upon any interstate commerce, the lower court must be affirmed.

---

[3] *See, Diederich, Does Garbage Have Standing?: Democracy, Flow Control and a Principled Constitutional Approach to Solid Waste Management,* 11 PACE ENVT'L L. REV. 157 (Fall 1993), hereinafter "*Does Garbage Have Standing.*"

[4] *See, id.*, at pp. 198-208.

ARGUMENT

POINT I
MONOPOLY PUBLIC CONTROL OF A COMMUNITY'S TRASH IS A CONSTITUTIONAL MEANS OF PROTECTING LOCALITIES THROUGHOUT THE NATION

A. The "Golden Rule" Applied to Municipal Management of Trash

Dormant Commerce Clause jurisprudence has as its core the "do unto others" philosophy of the Golden Rule applied to commerce among the States.[5] Respondents' public system applies this principle. If every municipality with trash responsibilities were to follow Respondents' example, by creating a comprehensive system for managing its own citizens' wastes, and dealing with the private sector on a fair and non-discriminatory basis when and if its services are needed, every community and the Nation would benefit.

The notion that such self-management and disposal of local solid waste might result in interstate trade wars, jealousies and protectionism is simply absurd. Communities will not retaliate if other communities self-manage their own citizens' wastes, nor will States, nor will foreign countries.[6] It is simply preposterous to believe that the citizens of Canada would "retaliate" by exporting less solid waste to New York State if New York State's communities exported less self-managed waste to Canada. More likely, all would regard this as in the public interest of both countries, as decreased trash volume means less inefficiency, with natural resources conserved and reduced environmental risks.

Self-management of waste is not protectionism. It is a better solution than Professor Tribe's suggestion that States simply exclude everyone from their landfills, and thus drive up disposal costs. He viewed this as one means to foster

---

[5] The Commerce Clause, art. I, § 8, cl. 3 empowers Congress "To regulate Commerce ... among the several States...."

[6] *See generally, Does Garbage Have Standing, supra*, at pp. 197-208.

waste reduction because, he states, this Court has otherwise "tied us to the constitutional mast of our 'collective garbage,' when the barge is 'sinking'..." *See*, TRIBE, AMERICAN CONSTITUTIONAL LAW (3d Ed.) § 6-6 note 54.

Yet we Americans need not sink in our "collective garbage." *Cf., id.*, p. 1068. Consistent with the Golden rule, federal environmental policy disdaining waste, and a community's desire to manage citizens' solid waste and sanitation in a sound manner, communities may undertake waste management in a number of ways.

One way is to use a flow control ordinance to control and consolidate waste within a municipal system. This is neither revolutionary nor offensive. Flow control is merely one tool for directing waste flow. Another method is municipal collection, where a sanitation or public works department ("DPW") vehicles collect, for example, all of a city's trash. In the past, disposal was commonly at the city dump.[7] Another method of control would be the award of an exclusive franchise. *See, California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 305 (1905). Other economic and contractual tools can be used as well. *See Appendix "B."*

Whatever the method used, the goal is the same—the public welfare. As stated (but recently forgotten[8]) by the Sixth Circuit in *Hybud Equip. Co. v. City of Akron*:[9]

> "[C]ontrol of local sanitation, including garbage collection and disposal, like fire and police protection, is a traditional, paradigmatic example of the exercise of municipal police powers reserved to

---

[7] *See generally*, WILLIAM RATHJE & CULLEN MURPHY, RUBBISH! THE ARCHAEOLOGY OF GARBAGE 9 (1992).

[8] *Cf., National Solid Waste Management Association v. Daviess County*, 434 F.3d 898 (6th Cir. 2006). This case creates a split between the circuits at issue here.

[9] 654 F.2d 1187, 1192 (6th Cir. 1981), *vacated*, 455 U.S. 931, *cert. denied*, 471 U.S. 1004 (1985)

> state and local governments under the Tenth Amendment. . . . [and which ordinances] are rationally related to a matter of legitimate local concern."

This local police power is embodied into federal and New York State environmental law, favoring home rule over garbage. As Congress declared, "the collection and disposal of solid wastes should continue to be primarily the function of state, regional and local agencies." *See*, Resource Conservation and Recovery Act ("RCRA") § 1001(a)(4), 42 U.S.C. § 6901(a)(4). Congress left responsibility for solid waste management with the States and their political subdivisions, and thus to government closest to the People.

Of course, the Golden Rule also permits a community to choose to do almost nothing at all. It can choose laissez-faire, and let its residents individually manage their own waste, such as by hiring a local trash collector. Unfortunately, the history of solid waste management is that less regulation means less oversight, more pollution, and sometimes the incursion of organized crime.

Respondents have chosen an intermediate path between total control and laissez faire, by creating a public system to maintain control over the citizens' waste and its disposal, while at the same time allowing a private sector role in collection. Respondents' citizenry has democratically chosen this means, as best for serving the public interest. The choice—monopolistic control of waste using flow control—is entitled to judicial deference.

B. The Right of the Citizenry to Monopoly Public Service Over Its Trash

1. Public monopolies are designed for the public interest

Public monopolies are a well tested method of providing a public service. There are many types of public monopolies, involving many types of public service.

The right of local government, on behalf of its citizens, to undertake monopoly public service authorized by the State is beyond dispute. Monopoly public service displaces competition, yet it violates neither the federal antitrust laws nor the dormant Commerce Clause. *See*, *Parker v. Brown*, 317 U.S. 341 (1943). The legislature of the State of New York affirmatively granted Respondents' citizens the right to monopoly public service. *See*, N.Y. Public Authority Law § 2049-ee(7). Monopoly control over solid waste is properly viewed as providing a vital public service. This is especially true as to waste. Unlike a water, telephone or electric utility, the goal is elimination, not production. There can be no "net profit."

A community has the right to control its waste, just as the city in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) had the right to control sewerage within its authorized territory, and even more so than the State of California had in controlling growers' raisins (a product) in *Parker*. Public monopoly is proper and constitutionally permissible.

"Hands on" public sector management of waste is consistent with fundamental principles of environmental law,[10] especially the "proximity principle" that pollution is best managed closest to its source. Local public sector management of solid waste is also consistent with the principle of subsidiarity,[11] a concept implicit in the Tenth Amendment, that governance is best achieved at the appropriate level closest to the people.

---

[10] Professor Phillip Sands identifies three fundamental environmental law principles: (1) the Polluter Pays principle; (2) the Precautionary principle; and (3) the Proximity principle. The Oneida-Herkimer system advances each principle. The hauler Petitioners' vision advances none. *See*, SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW I: FRAMEWORKS, STANDARDS AND IMPLEMENTATION (2d ed. 2003).

[11] For a brief general discussion, see *Wikipedia, The Free Encyclopedia*, at http://en.wikipedia.org/wiki/Subsidiarity. *See also, Does Garbage Have Standing, supra*, at 165 n. 21, 202, n. 185 and 203 and accompanying text.

Yet public monopolistic control need not include denial of private sector involvement.

2. *Monopoly public control can include the private sector*

As to waste which citizens voluntarily place curbside, only the Oneida-Herkimer system, and no other individual or entity, has an entitlement. The Oneida-Herkimer citizens place waste curbside for their government to manage through the public system. The citizens have democratically chosen this exclusively local management. The system maintains monopolistic control of local solid waste, and the right to possess it.

The system could permissibly displace the private sector entirely, including the petitioning haulers here. However, there is no need. As argued in Point II (C) below, these haulers, often "mom and pop" businesses, are obliged by the flow control laws to respect the public system. The trash collectors gain no "title" to the trash. Their possession of the trash is a constructive bailment.

Because the Oneida-Herkimer carters are never entitled to the trash within a monopoly public system, such a system does not discriminate against, nor burden,[12] nor even involve, interstate commerce.

There are much broader implications. If carters become entitled to citizens' trash merely by collecting it, then large

---

[12] Where government regulation involves burdening commerce, this Court applies a balancing test. *See, Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Under this test, reasonable regulation of solid waste will be upheld. *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 462, 470-74 (1981), where the Court applied the *Pike* balancing test to sustain a state law banning the retail sale of milk in plastic non-returnable containers (thus favoring local industry), after balancing its burden on interstate commerce against the purposes of the law—to promote resource conservation, to ease solid waste disposal problems and to conserve energy.

cities which currently use DPW collection to bring trash to city disposal and recycling facilities could not privatize collection without risking non-use of the public facilities. This is counter intuitive, unreasonably ties the public's hands, and undercuts democracy.

3. *Monopolistic public control of local waste does not implicate interstate commerce*—Clason v Indiana

This Court's solid waste jurisprudence supports the view that local management of municipal solid waste does not implicate the dormant Commerce Clause. Where waste is not tendered to the private sector but remains within a municipal system, local control has been upheld. Thus, in *California Reduction Co., supra*, the Court approved a garbage franchise by allowing San Francisco to award an exclusive franchise for waste collection and disposal at a city-designated site. In *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), the Supreme Court allowed a city's monopolization of sewerage waste, including tying arrangements with local collectors.

And, in a case which this Court may view as controlling precedent, *Clason v. Indiana*, 306 U.S. 439 (1939), the Court upheld against a dormant Commerce Clause challenge a flow control law directing private haulers of dead animals (one type of solid waste) to a designated disposal facility. In upholding the challenged local law, the Court stated:

> "[T]he mere power of the Federal Government to regulate interstate commerce does not disable the States from adopting reasonable measures designed to secure the health and comfort of their people."

Id., 306 U.S., at 444.

As in the present case, the local law in *Clason* did not discriminate in favor of or against in-state or out-of-state haulers, but merely accomplished a valid governmental objective. *Clason* involved only a small segment of municipal solid waste, dead animals. Yet for Commerce

Clause purposes, Respondents' comprehensive system likewise involves "reasonable measure[s] designed to secure the health and comfort of their people." *Id.*

4. Entrepreneurial municipalities are entitled to become waste havens

The converse of monopoly public service is free competition. If a business, or a government acting as a profit-making enterprise (e.g., Sussex and Charles City counties in rural southwest Virginia, *amici* for Petitioners herein), wish to invest in building waste disposal capacity, and offering such to communities needing disposal options (such as New York City), this is their choice. *Philadelphia* will protect such free enterprise. Such entities located here or overseas can seek to become waste havens, and profit on other communities inability to manage local trash.

Offering to provide services to help municipalities is one thing. It is quite different to seek to prevent municipalities from engaging in self-help. Petitioners ask this Court to compel the use of the private sector, by impairing municipalities' right to self-manage their own citizens' wastes in the first instance. Petitioners' argument suggests compelled privatization of solid waste management.

5. Discriminatory governmental mischief is not protected—Carbone & Philadelphia

If waste is tendered to the private sector for disposal or other management, it should be tendered to the interstate waste service marketplace on an evenhanded nondiscriminatory basis. *See, e.g., Houlton Citizen's Coalition v. Town of Houlton*, 175 F.3d 178, 184 (1st Cir. 1999); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3rd Cir. 1995), *cert. denied* 516 U.S. 1173 (1996). Respondents do this. They hire based upon merit, not geography. This "full and open competition" places no burden upon, nor discrimination against, interstate commerce in any respect.[13] Oneida-Herkimer carters can compete

freely, within the local waste collection bottle, and have no property interest in the people's trash.

On the other hand, an improperly motivated monopoly, such as one involving a conspiracy to provide excessive profits to a local business (not present, but cautioned against, in *Parker*[14]), or as in *Carbone*, stealing a competitor's out-of-state waste trade to favor a local business, is impermissible. It is municipal mischief.

Carbone involved a town's *ad hoc* financial scheme to opportunistically favor of a local private vendor, even to the extent of allowing it to grab its competitor's New Jersey trash. This was not done pursuant to any authorized solid waste management plan.[15] The town did not even attempt to show that it had an authorized *Parker*-sanctioned public monopoly. The federal district court[16] recognized the mischief, while the state courts did not. *Carbone* had nothing to do with public monopoly and sound, even-handed, comprehensive solid waste management. The town abused its governmental power to favor a local private company, grabbing interstate business, for a short-term financial fix. This was local government mischief, not principled waste management.

Similarly, State and local governments have no right to intrude with the operation of the interstate market in waste management services. Such would violate the Golden Rule (and *Philadelphia* and its progeny[17]) by denying needy communities, such as New York City, the option of using the

---

[14] 317 U.S., at 352-53 ("... we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade....")

[15] The County of Rockland was the regional planning unit, not the town.

[16] *C & A Carbone v. Town of Clarkstown*, 770 F.Supp.848, 855 (S.D.N.Y. 1991).

[17] *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); 511 U.S. 93 (1994); *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992); *Oregon Waste Services v. Department of Environmental Quality*, 511 U.S. 93 (1994).

interstate waste businesses to help move their clients' trash to, say, a private New Jersey or Michigan landfill. Importation barriers at State lines constitute discrimination.

Local grabs for local business, or importation barriers to favor a State, are protectionist, discriminatory to the outsider and invite resentment. These are constitutionally impermissible governmental misconduct. These are totally unlike public self-management of local trash—democratically chosen community housekeeping.

POINT II
PUBLIC MANAGEMENT LOCAL TRASH DOES NOT IMPLICATE INTERSTATE COMMERCE

Local public waste management does not implicate the dormant Commerce Clause. The annexed diagrams are designed to simplify the concept. *Appendix* "A" shows how local waste is kept and managed within the Oneida-Herkimer system's "bottle" of public control until delivered to the public facilities. Interstate commerce is involved only if Respondents seek the waste disposal services of the outside private sector as to waste which it cannot manage itself. *Appendix* "C" depicts various permissible and impermissible flows of municipal waste. *Appendix* "D" depicts Oneida-Herkimer system waste flow, including its potential choice of employing, to some degree, the outside private sector for disposal services.

A. Waste is not an "article of commerce"

For purposes of dormant Commerce Clause analysis, it warrants repeating that waste itself is not an "article of commerce." The "commerce" involved in dormant Commerce Clause cases involving solid waste is the service of handling and disposing of the trash, not the trash itself.[18]

This makes sense. The municipal solid waste involved, like other species of solid waste (hazardous, medical,

---

[18] *See, Carbone, 511 U.S., at 391; Does Garbage Have Standing,* at 158.

nuclear), are pollution, not product. One does not pay for waste, but rather pays to get rid of it. It has negative value, and is best never created. Federal policy is to minimize its creation.[19] Less waste means more economic efficiency. This Court has approved State law encouraging waste reduction. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473, n. 17 (1981)(waste reduction as a proper goal of the Minnesota's ban on plastic non-returnable milk containers.)

B. Reducing or Eradicating Waste Does Not Impair Commerce

Petitioners' argument is that waste creation creates commerce, and that waste eradication through, say, sound local disposal, interferes with such commerce. This is specious.

No one pays for anyone else to create waste. It is not a goal of manufacture. Like other forms of waste, solid waste is an unwanted and unhealthy byproduct. If waste could be eliminated, it would benefit society just as would the elimination of crime, fire, poverty, disease and illiteracy. The waste industry has no legitimate complaint. The dormant aspect of the Commerce Clause offers no protection for unwanted blights, whether crime, fire, illiteracy or solid waste.

This Court has long endorsed the notion that a City can manage its own waste itself. *California Reduction Co., supra.* It long ago upheld a flow control law allowing municipal control of solid waste. *Clason, supra.* And this Court has upheld a statute serving Minnesota's interests in conserving resources and reducing solid waste. *Clover Leaf Creamery, supra.* A ruling by this Court holding that state

---

[19] *See*, Resource Conservation and Recovery Act ("RCRA") § 1001(a)(4), 42 U.S.C. § 6901(a)(4) ("leadership ... to reduce the amount of waste and unsalvageable materials and provide for proper and economical solid waste disposal practices."); U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda For Action* 11 (Feb. 1989).

and local government cannot reduce and eliminate local waste will jeopardize sound precedent.

Petitioners do not dispute that a municipality can permissibly dispose of trash locally, and completely, through recycling, composting, landfilling or, if it were deemed by the citizenry appropriate, waste to energy incineration. If truly an "article of commerce," such destruction would be abhorrent.

C. Public Sanitation trucks or private trucks make no constitutional difference

It makes sense that a community's exclusively public self-management of local waste is constitutionally permissible, but no sense that the dormant Commerce Clause is suddenly activated if local haulers place their hands on it. The public can permissibly eradicate its own trash using DPW collection and disposal. Allowing non-exclusive private collection within a public system should not compel a different result.[20]

No constitutional distinction should be made between citizens paying taxes for DPW trucks to bring their trash to their public facilities, and citizens paying their waste carter directly for this service. The only economic difference between flow controlled and municipally-sponsored collection is the method of paying the trash collector—municipal taxes versus private invoices. From the customers' perspective, flow control results in payment in direct relation to waste collection needs, and recycling effort. It is fairer allocation of cost than to tax for DPW collection. It encourages waste reduction, reuse and recycling.

Within the "local collection bottle" all carters find a level playing field. All contribute a portion of collection proceeds as "tip fees" to support the public system. If any were

---

[20] An award of an exclusive franchise for waste collection could be used. *California Reduction*. The Oneida-Herkimer system can be viewed as a non-exclusive franchise.

permitted to avoid the public disposal and pocket the tip fee, all other carters and the citizens' pubic system are damaged. And if all carters could avoid the public system, then the citizens would be forced to pay twice—the carter bills and tax bills.

D. The trash collectors' possession of the local citizens' trash is a constructive bailment, with no claim of title

The carters here claim an entitlement to the waste they possess. However, citizens do not give "title" to their trash to their haulers, nor could they permissibly do so, because under the flow control laws at issue, the community's trash must be directed to, and thereby becomes the property of, the citizens' representatives, their local government and waste authority.

Upon picking up curbside waste, the haulers' possession is a constructive bailment, as the flow control law and public monopoly system imposes upon the haulers the legal obligation to deliver the bailed waste to the public facilities. *See generally*, 9 N.Y.JUR.2d, *Bailments & Chattel Leases,* §§ 5 & 27. Essentially, there is an "implied by law" agreement between the local residents and the haulers that the hauler's lawful possession of waste is conditioned upon the requirement of delivery to the citizens' public system. The carters are mere bailees, with no property entitlement to the citizenry's and its government's trash.

The plaintiff interstate operator in *Carbone* could fairly be said to hold rightful "title" to the waste in its possession (especially from its out-of-state customers). The New Jersey residents never voted to allow a New York jurisdiction to control their trash. In contrast, the Oneida-Herkimer citizenry did just that. They voted, through their elected representatives, to keep their trash within their own public system. They voted for a system where their waste collectors gained only temporary possession, never a permanent right of possession, or title. The Oneida-

Herkimer citizens, through their flow control ordinances and their placing waste curbside, made their carters mere bailees.

If there is any doubt on the public's possessory right to its waste, this Court has instructed in *Standard Oil Co. v. New Jersey*, 341 U.S. 428, 435-36 (1951), that:

> "As a broad principle of jurisprudence ... a state... may use its legislative power to dispose of property within its reach, belonging to unknown persons. Such property thus escapes seizure by would-be possessors and is used for the general good rather than for the chance enrichment of particular individuals or organizations. (*emphasis added; footnote omitted*).

State law defines property rights. Under the common law of bailment, and the State and local law empowering Respondents' monopoly control of waste, the solid waste at issue belongs to the citizens and their public monopoly, not the haulers.[21]

The Court can decide this case in favor of Respondents on this basis alone. The Respondents' citizenry directed its waste be brought to its public facilities, by enacting the system. The citizens further support their democracy by voluntarily placing their trash curbside. Petitioners possess only a constructive bailment, which disposes of their argument that they have a commercial right to abscond with the citizens' trash.

---

[21] Waste carters and their industry should not have standing to assert rights to trash owned by the local citizenry and their governmental representatives. *See, Dennis v. Higgins*, 498 U.S. 439, 461 (1991) (Kennedy, J., dissenting). Their argument is analogous to allowing a private bus company a constitutional entitlement to bring schoolchildren which it picks up to a school of the bus company's choice. The public school system and parents have legal control of the children, just as the public waste system (and the residents) retain legal control to the waste under the constructive bailment resulting from the local flow control laws.

E. The public system properly includes the monopolistic "bottling" of the local citizenry's trash

Whether a bailment or not, there is no "commerce" in the local waste, and certainly no interstate commerce. *Parker v Brown* makes clear that the commodity—in that case raisins—managed within a public service monopoly is not yet in interstate commerce.[22] The States retain, said Chief Justice Stone, "the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken."[23]

This is even more true with local waste than with growers' raisins. In the present case, the citizenry has, through the operation of representative democracy, agreed that their waste must be brought to their public facilities for management, recycling, and otherwise proper disposal. This epitomizes democratic decisionmaking, and local responsibility. The Oneida-Herkimer citizens' pay for this democratically created, State-approved, RCRA-compliant comprehensive solid waste management system. It is their trash, their dollars, and their system.

The carters' claim to entitlement is merely that they temporarily possess the citizens' and public system's trash.

POINT III

FEDERALISM, THE TENTH AMENDMENT, AND THE GUARANTEE CLAUSE PROMISE DEMOCRACY OVER TRASH

A. Congress is without affirmative Commerce Clause power to prevent local public management of local waste

A plausible argument can be made that Congress would be acting in excess of its Commerce Clause powers if it attempted to enact legislation preventing local government from managing its own citizens' waste. Public solid waste management and sanitation is a paradigmatic example of

---

[22] *Parker, supra*, 317 U.S., at 360-61.

[23] Id. at 360.

state and local government exercise of its traditional local police power. *See, Hybud, supra.* Reducing or even eliminating local solid waste has no adverse impact upon interstate commerce. It certainly has less adverse impact on commerce than reducing the number of handguns near schoolchildren, or reducing domestic violence interfering with the lives of women. *Cf.*, *United States v Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000). Those guns and violence were beyond federal power. So too should local waste management of local trash.

Of course, this Court has granted Congress considerable leeway regarding the scope of its powers under the affirmative Commerce Clause. As set forth in *Garcia*,[24] the structure of the national government will ordinarily safeguard state and local governments, and principles of federalism, against excessive intrusion from the federal Congress.

However, there is no similar political protection when this Court exercises, as an unelected body, its judicial prerogative to infer congressional intent under the "dormant" aspect of the Commerce Clause. The exercise of such judicial prerogative is certainly appropriate when a state or local government is found to have regulated in a manner which is discriminatory against out-of-state commercial interests, or which unduly burdens interstate commerce. This Court correctly saw protectionism, favoritism and discrimination against interstate commerce in *Carbone*, and thus properly held that the dormant Commerce Clause was violated.

However, this case is entirely different. Here, an entirely local governmental activity is engaged in solving a local problem in a manner which involves rational democratic choice, prudent for the community's long-term economic and environmental welfare, consistent with federal environmental law and internationally accepted

---

[24] *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

environmental norms. There is no discrimination against any other community or State. The state legislature authorized monopoly public service to achieve results which, if duplicated nationally, would help solve the Nation's solid waste problems. The local people pay for the local system.

Based upon the above, if Congress enacted a law stating that the waste industry is entitled to local citizens' trash, this Court should hold such unconstitutional as beyond its Commerce Clause reach. The federal government is limited to its enumerated powers, and the Commerce Clause does not give it unrestrained power. *See*, *Lopez*, 514 U.S., at 556-57, 563-68; *Morrison*, 529 U.S., 607-08, 613-19. Local waste, which is incinerated, landfilled or otherwise disposed of locally is certainly not "commerce" that flows "among the states." *Lopez*, 514 U.S., at 556-68; *Morrison*, 529 U.S., 610-18.

Thus, this Court must not grant the waste industry indirectly, under the dormant Commerce Clause, that which Congress could not grant under its affirmative power.

B. This Court implicitly recognized in *Carbone* that the citizenry can publicly manage waste

This case involves facts that are almost exactly the opposite of, and profoundly different from, those reviewed in *Carbone*. As argued above, the town employed its governmental power in an *ad hoc* fashion in order to favor a local vendor, who happened also to be stealing its competitor's out of state waste trade.

It appears this Court's internal debate was whether the town-sponsored local business was merely a favored local business, and thus discrimination under this Court's longstanding "local grab" jurisprudence,[25] or whether, according to the dissent, it was "essentially an agent for the municipal government" thus authorized monopolistic

---

[25] *See, e.g., Minnesota v. Barber*, 136 U.S. 313 (1890); *Carbone, supra*, 511 U.S., at 391.

conduct. *Id.*, at 416, 424-25. The majority did not view the Town's "single local proprietor" as governmental. *Id.*, at 392. As stated by Justice Kennedy:

> "The essential vice in laws of this sort is that they bar the import of the processing service. Out-of-state [businesses] are deprived of access to local demand for their services. Put another way, the offending local laws hoard a local resource ... for the benefit of local businesses ...." (*emphasis added*).

Id., at 392.

The bare majority[26] in *Carbone* found "[d]iscrimination in favor of local business." *Id.* Justice Kennedy concluded his majority decision by summarizing that: "State and local governments may not use their regulatory power to favor local enterprise...." *Id.*, at 394 (*emphasis added*).

The monopoly public service involved in the present case is not an "enterprise." It is public service. It favors no local business whatsoever. It cannot even fairly be said to favor itself, as the local citizenry itself pays for everything—the haulers and the public system, "on the back" of no one else.

C. Democracy will suffer an arctic chill, if a Citizenry cannot govern its local concerns

The Guarantee Clause[27] promises a "republican form of government" to the People. Yet if the People, through their representatives, cannot control their citizens' own wastes, under Petitioners' profit-making vision of the dormant Commerce Clause, what can they control? Local communities self-manage crime, fire, social services, public health and public education. These are essential, traditional

---

[26] In her concurrence, Justice O'Connor disagreed with the majority's conclusion that the Clarkstown flow control laws discriminated against commerce. 511 U.S., at 401, 405. She certainly would have found no discrimination with the Oneida-Herkimer system.

[27] U.S. Constit., article 4, § 4.

activities of local government.[28] If granting the private sector a small role in any of these other versions of monopoly public service can result in potential Commerce Clause liability, then State and local democracy is seriously imperiled. As this Court observed in *Fry v. United States*, 421 U.S. 542 (1975):

> "The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."[29]

And as Professor Lawrence Tribe cautions:

> "The most fundamental threats to state sovereignty ... [are] federal laws that restructure the basic institutional design of the system a state's people choose for governing themselves ... an assault on those 'democratic processes through [which] ... citizens ... retain the power to govern ... their local problems.'"[30]

Petitioners ask this Court to ignore State and local democratic process used to create the Oneida-Herkimer system. As recognized by this Court in *New York v. United States*,[31] a case involving a different species of waste, nuclear waste:

> "Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local

---

[28] *See, National League of Cities v. Usery*, 426 U.S. 833, 854 (1976) (examples of traditional government functions are fire prevention, police protection, sanitation, hospital services and education), *overruled by Garcia, supra.*)(*emphasis added*)

[29] 421 U.S., at 547 n.7 (1975).

[30] *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 397 (2d ed. 1988), quoting *FERC v. Mississippi*, 456 U.S. 742, 790 (J. O'Connor).

[31] New York v. United States, 505 U.S. 144, 169 (1992).

> electorate in matters not preempted by federal regulation."

This Court must allow New York State and Oneida-Herkimer citizens their democracy. The Oneida-Herkimer system, if permitted to continue to operate, is a system which may become an exemplary model for the country, and perhaps even the world. It is, in some ways, an experiment—and precisely the type of State-sponsored laboratory which this Court has long endorsed under principles of federalism.[32] *See, e.g., Garcia, supra,* 469 U.S., at 546 ("The science of government ... is the science of experiment."). The Oneida-Herkimer community has made plans for its solid waste future. If disposal sites dry up in the future, or transportation costs become exorbitant, or if the Nation requires more aggressive waste reduction and recycling in the future, Oneida and Herkimer counties will be prepared. The Congress, when it enacted subtitle D of RCRA, the federal provisions for municipal solid waste management, could not have envisioned a better model than the one under scrutiny here.

Respondents have described the economic and environmental benefits of their public system. The Petitioners, on the other hand, assert that their approach is economically better. The relevant factor, however, is that the State and local citizenry have democratically authorized this experiment in exemplary local waste management. Because the dormant Commerce Clause is designed to ensure national solidarity, not necessarily economic efficiency,[33] the economic merits of the argument must defer to the democratic choice, especially where, as here, it is the local citizenry's dollars which pay for their public system.

---

[32] For a discussion of States as laboratories of experiment, *see, Does Garbage Have Standing,* at pp. 221-226.

[33] *See, e.g., Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-23 (1935); TRIBE (3d ed.), *supra,* at p. 1057. *See also, Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 127 (1978)(Commerce Clause does not protect the particular structure or methods of operation of a market.)

If the Oneida Herkimer model is invalidated, the citizens of this relatively small community will likely be required to pay damages and the costs of this litigation under 42 U.S.C. § 1988. *See, Dennis v. Higgins*, 498 U.S. 439 (1991). Though unfortunate for this community, the injury to the general public and the Nation will be much more profound, because it will blow an arctic wind over other localities thinking about experimenting with new public waste management strategies using flow control.

Subjecting local governments to "Pike balancing" also stifles local democracy. How many localities will be willing to democratically create a system knowing that a federal court may invalidate it after "balancing." The Court can avoid these chills upon local democracy, by applying the constitutionally principled approach to waste management argued above.

CONCLUSION

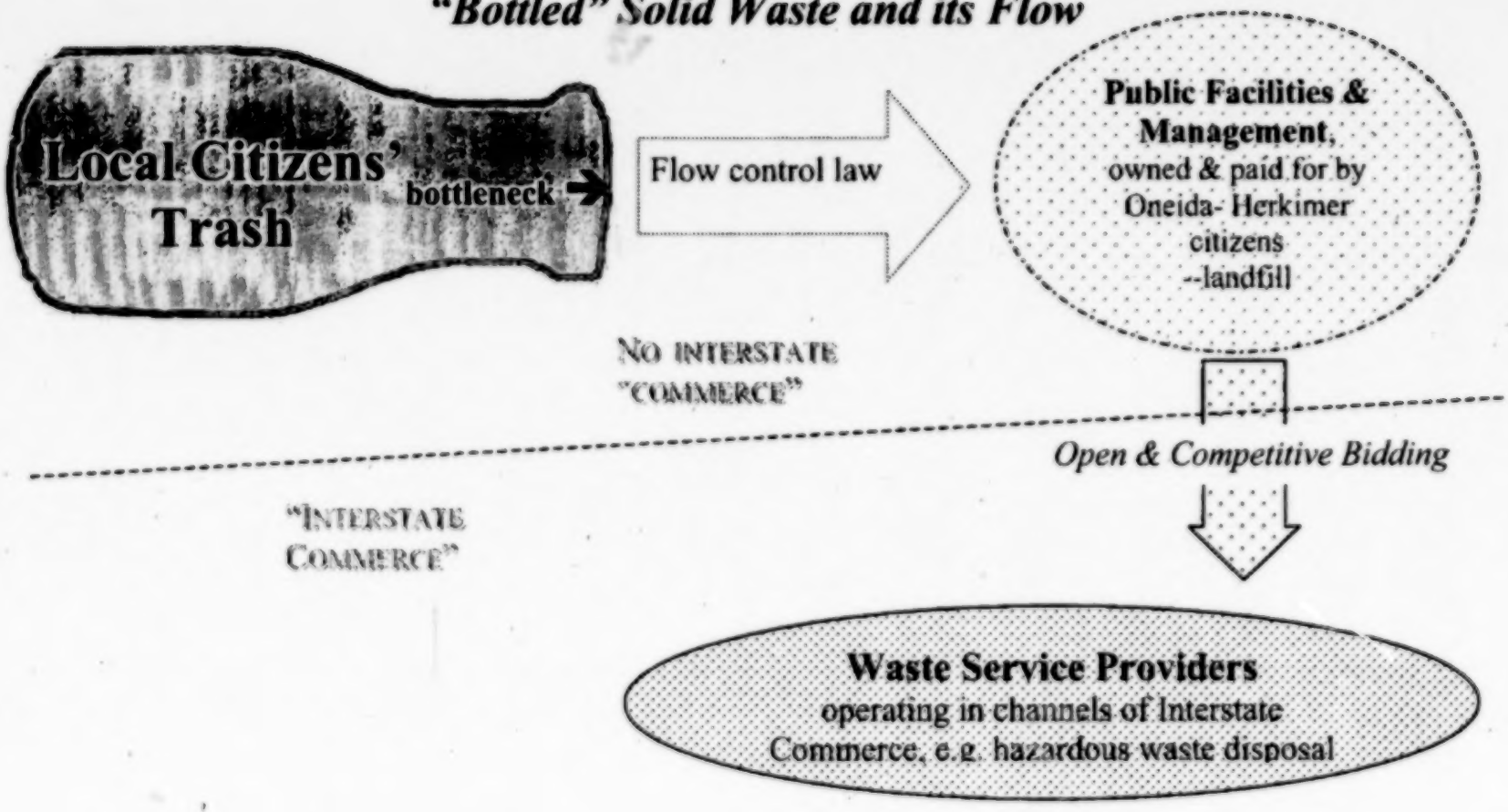
The Oneida-Herkimer system is worthy of nationwide emulation, not judicial abolition, and its citizens are entitled to their democracy. Your *amicus* Federation urges that the court below be affirmed.

Respectfully submitted,

MICHAEL D. DIEDERICH, JR.*
Attorney at Law
361 Route 210
Stony Point, N.Y. 10980
(845) 942-0795
Mike@DiederichLaw.com

*Counsel of Record *Counsel for Amicus Curiae*

"Bottled" Solid Waste and its Flow



Appendix "A"

BEST AVAILABLE COPY

Appendix "B"

Various Methods of "Flow Control"

The direction or "flow control" of waste to designated treatment or disposal facilities can be accomplished through various means:

- municipal collection, by sanitation department garbage trucks,
- "economic flow control," using financial incentive (such as offering free or subsidized delivery/disposal options),
- "contractual flow control," such as through award of a public franchise
- regulatory flow control (using an ordinance or other law).

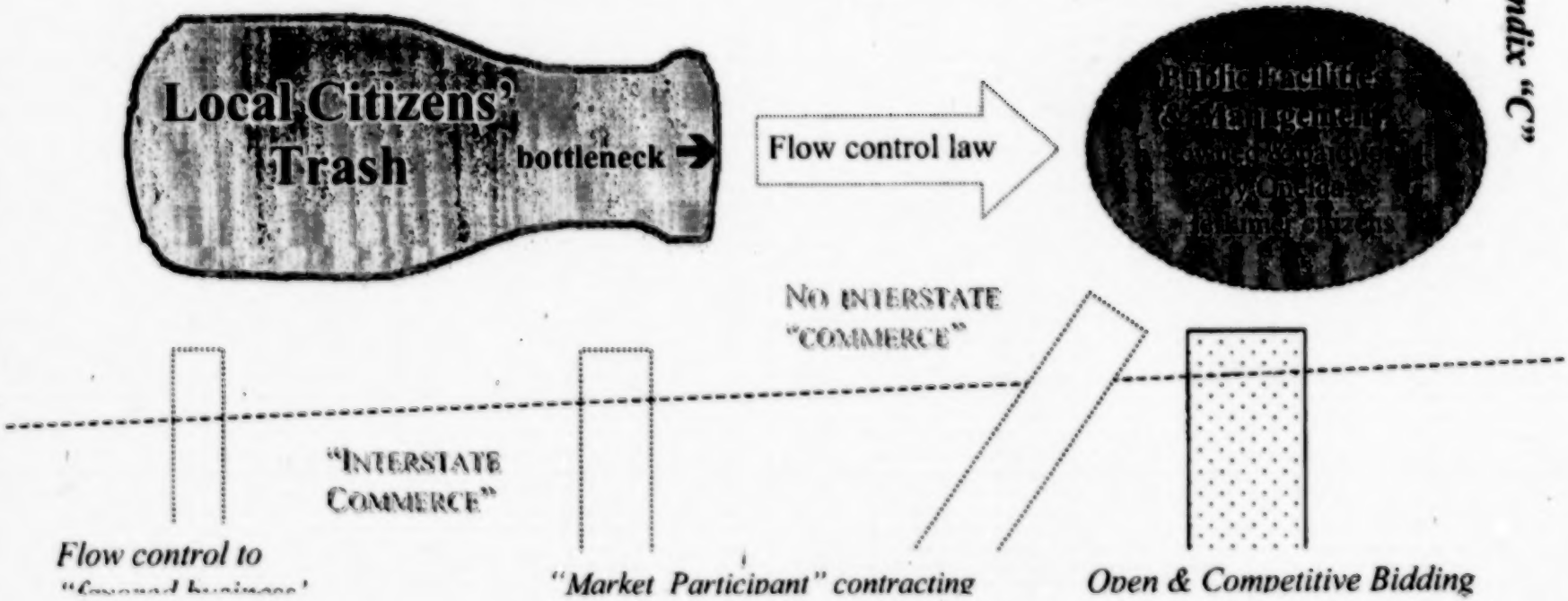
The flow can be directed to either a public system, or to a private waste facility. Absent fair and open competition, flow control to a private entity may discriminate against or burden commerce.

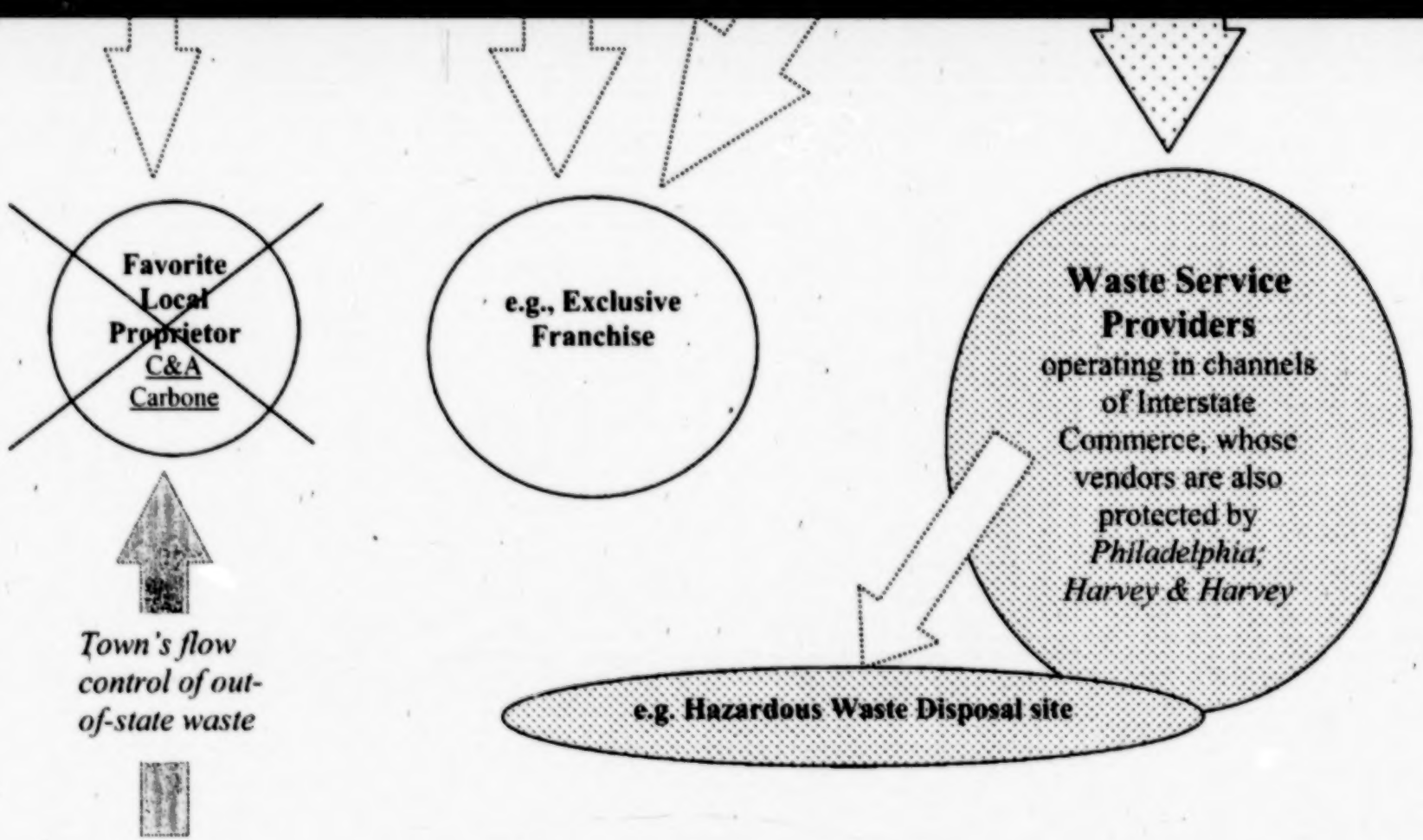
Appendix "B"

Diagram of Methods of Flow Control

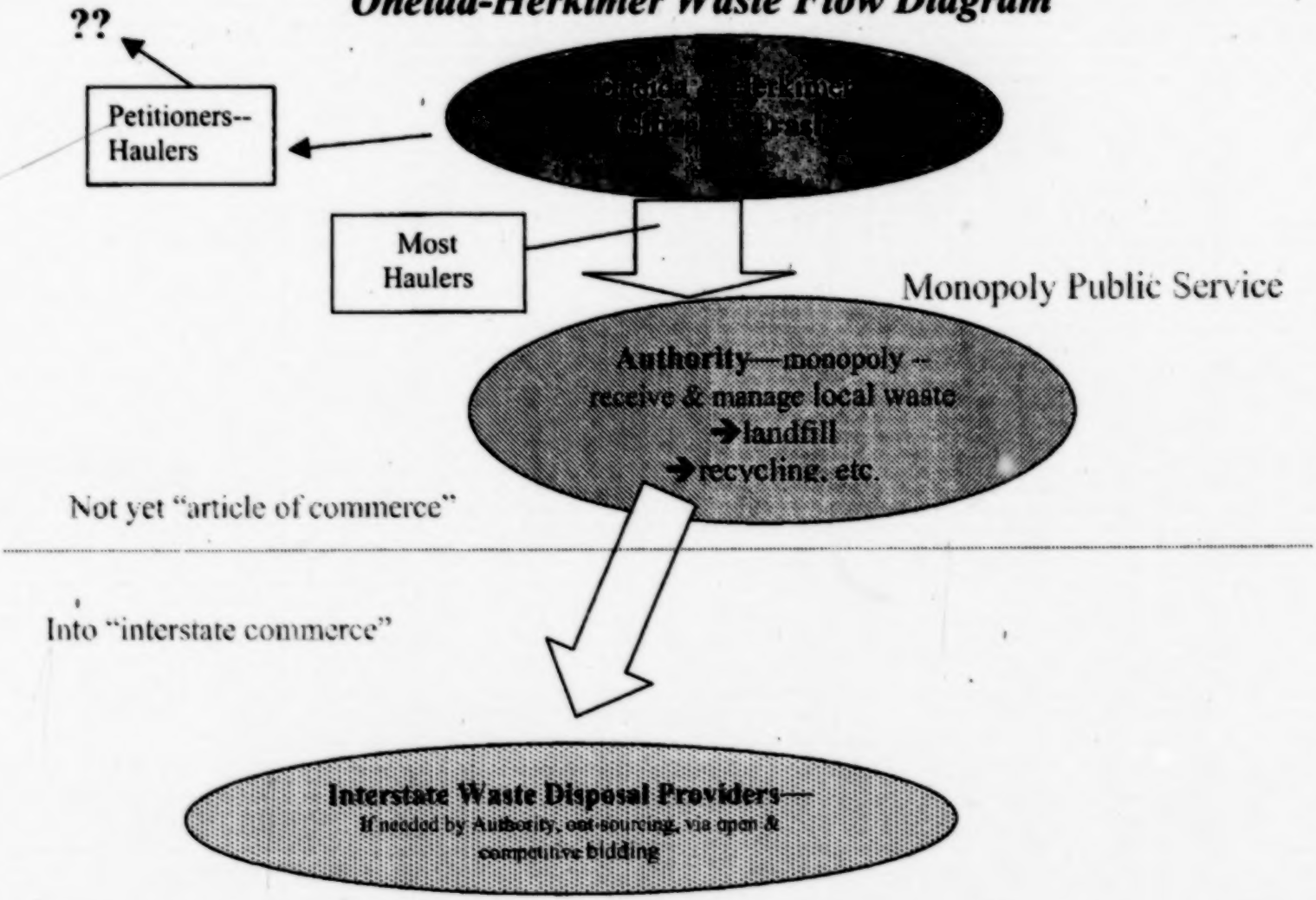
Appendix "C"

Possible flow of Solid Waste




Favorite Local Proprietor
C&A
Carbone
e.g., Exclusive Franchise
Waste Service Providers
operating in channels of Interstate Commerce, whose vendors are also protected by
Philadelphia; Harvey & Harvey
e.g. Hazardous Waste Disposal site
Town's flow control of out-of-state waste

Oneida-Herkimer Waste Flow Diagram



(20)

File Date: 12/7/2006

No. 05-1345

IN THE

Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., *et al*,

Petitioners,

v

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, *et al*,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF ROCKLAND COUNTY SOLID WASTE MANAGEMENT AUTHORITY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

BRIDGET GAUNTLETT
General Counsel
ROCKLAND COUNTY SOLID WASTE MANAGEMENT AUTHORITY
420 Torne Valley Road
Hillburn, NY 10931

ROBERT BERGEN*
TENO WEST
LEAH GRIGGS PAULY
HOLLAND & KNIGHT LLP
195 Broadway
New York, NY 10007
(212) 513-3200

Attorneys for Amicus Curiae

* *Counsel of Record*

205226

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Interest of Amicus Curiae	1
Summary Of The Argument	3
Argument	4
I. The State Action Exemption From Anti-Trust Restrictions, Long Recognized By The Court As An Attribute Of State Sovereignty, Should Not Be Eroded By An Unwarranted Extension Of Dormant Commerce Clause Jurisprudence	4
II. Public Monopolies Designed To Implement Police Power And Which Even-Handedly Displace Competition Do Not Discriminate Against Interstate Commerce	10
III. The Preservation of Public Monopolies Is Essential To Our Federalist Form Of Government	13
Conclusion	18

TABLE OF CITED AUTHORITIES

Page

Cases:

Barbier v Connolly,
113 U S 27, 5 S Ct 357,
28 L Ed 923 (1884) 10, 12

Breard v City of Alexandria, La ,
341 U S 622, 71 S Ct 920,
95 L. Ed. 1233 (1951) 8, 11

C&A Carbone, Inc v Town of Clarkstown,
511 U.S 3838, 114 S Ct 1677,
128 L Ed 2d 399 (1994) 13

California Reduction Co
v Sanitary Reduction Works of San Francisco,
199 U S. 306, 26 S. Ct. 100,
50 L Ed. 204 (1905) 11

Chemical Waste Mgmt v Hunt,
505 U S 334, 112 S Ct. 2009,
119 L Ed. 121 (1992) 13

City of Lafayette, La
v La Power & Light Company,
435 U S 389, 98 S Ct. 1123,
55 L Ed 2d 364 (1978) 5, 6

Fort Gratiot Sanitary Landfill, Inc
v Michigan Dep't of Natural Res ,
504 U S. 353, 112 S Ct. 2019,
119 L. Ed. 2d 139 (1992) 12

Cited Authorities

Page

Genentech, Inc v Eli Lilly and Co,
998 F.2d 931 (Fed. Cir. 1993), *cert denied sub nom*, 510 U S 1140, 114 S. Ct 1126, 127 L. Ed 2d 434 (1994), *overruled on other grounds by* 515 U.S 277, 115 S. Ct. 2137, 132 L Ed 214 (1995) . . 6

General Motors Corp v Tracy,
519 U S. 278, 117 S. Ct 811, 136 L Ed. 761 (1997) 9, 14

Gibbons v Ogden,
9 Wheat. 1, 6 L. Ed 23 (1824) 14

H P Hood & Sons, Inc v Du Mond,
336 U S. 525, 69 S Ct 657, 93 L Ed 865 (1949) 9, 10, 13

Hancock Indus v Schaeffer,
811 F 2d 225 (3d Cir. 1986) 8, 12

Hoover v Ronwin,
466 U S 558, 104 S Ct 1989, 80 L. Ed. 1989 (1984) 6

Huron Portland Cement Co v City of Detroit,
362 U S 440, 80 S Ct 813, 4 L Ed 2d 852 (1960) 8

Cited Authorities

Page

New Energy Co of Ind v Limbach,
486 U S. 269, 108 S. Ct 1803,
100 L Ed. 2d 302 (1988) 16

New Orleans Water-Works, Co v Rivers,
115 U S 674, 6 S Ct. 273,
29 L Ed. 525 (1885) 14

New State Ice Co v Liebmann,
285 U.S 262, 52 S. Ct. 371,
76 L Ed 747 (1932) 11

Northern Pacific Ry Co v United States,
356 U S 1, 78 S Ct 514,
2 L. Ed 2d 545 (1958) 4

Oklahoma Tax Comm'n v Jefferson Lines,
514 U.S 175, 115 S. Ct 1331,
131 L Ed. 2d 261 (1995), *reh'g denied*
514 U S. 1135, 115 S Ct 2018 (1995) 9

Oregon Waste Sys , Inc
v Dep't of Envtl Quality of Or,
511 U S 93, 114 S Ct 1345,
128 L Ed. 2d 13 (1994) 11, 13

Parker v Brown,
317 U S 341, 63 S. Ct 307,
87 L Ed 315 (1943) 5, 15

Cited Authorities

Page

Philadelphia v New Jersey,
437 U.S 617, 98 S Ct 2531,
57 L. Ed. 2d 475 (1978) 11, 12

Railroad Co v Husen,
95 U S 465, 24 L Ed 527 (1877) . . . 10

Slaughter-House Cases,
83 U S 36, 21 L Ed. 394,
16 Wall. 36 (1872) 14

Standard Oil Co v United States,
221 U S. 1, 31 S Ct 502,
55 L Ed. 619 (1911) 4

Town of Hallie v City of Eau Claire,
471 U S 34, 105 S Ct 1713,
85 L Ed 2d 24 (1985) 6, 8, 14

Tyler v Pipe Indus
v Wash State Dep't of Revenue,
483 U.S 232 (1987) 16

USA Recycling, Inc v Town of Babylon, Inc,
66 F.3d 1272 (2d. Cir 1995), *cert denied*,
517 U.S 1135, 116 S Ct 1419,
134 L Ed.2d 544 (1996) 11

United States v Am Linseed Oil Co,
262 U S. 371, 43 S. Ct 607,
67 L Ed 1038 (1923) 5

Cited Authorities

Page

United States v Topco Assoc, 405 U S 596, 92 S. Ct. 1126, 31 L. Ed 2d 515 (1972) 5

Federal Statutes:

Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-6 6

Resource Conservation and Recovery Act, 42 U S.C § 6901(a)(4) 17

Sherman Act, 15 U S C § 1 4

U S Const art. I, § 8 8

State Statutes:

N Y. Environmental Conservation Law §§ 27-106-07 7

N.Y. Public Authorities Law, §§ 2049-aa et seq 7

N.Y. Public Authorities Law, § 2049-tt 1, 7, 8

N Y Public Authorities Law §§ 2053-a et seq 1

N Y Public Authorities Law, § 2053-v . . . 1, 7, 8

Cited Authorities

Page

Miscellaneous:

Lincoln L Davies, Note, *If You Give The Court A Commerce Clause An Environmental Justice Critique Of Supreme Court Interstate Waste Jurisprudence*, 11 Fordham Envtl. L J. 207 (1999) 13, 17

James G Hodge, Jr , *The Role of New Federalism and Public Health Law*, 12 J L & Health 309 (1998) 14

The Federalist No 45 (Alexander Hamilton) (E.H. Scott ed. 1898) 5

Wendy E. Parmet, *Health Care and the Constitution Public Health and the Role of the State in the Framing Era*, 20 Hastings Const L Q. 267 (1992) 13

James A Tobey, *Public Health and the Police Power*, 4 N.Y U L Rev 126 (1927) 13, 14

INTEREST OF AMICUS CURIAE

Amicus Curiae Rockland County Solid Waste Management Authority ("RCSWMA")[1] is a public benefit corporation established in 1994 by an act of the Legislature of Rockland County, New York in accordance with the New York State Public Authorities Law [2] The State of New York has entrusted RCSWMA to protect Rockland County residents from the environmental and health hazards that result from the improper processing and disposal of solid waste RCSWMA is interested in the decision rendered in this case because, like Respondents, it has been delegated the authority to implement an integrated solid waste management plan by displacing competition through a public service monopoly [3]

RCSWMA regulates the processing of solid waste by contracting with Rockland County communities to serve as the exclusive provider of certain types of waste management services By displacing competition through monopoly control, RCSWMA is able to provide the comprehensive waste management necessary to satisfy the solid waste reduction, reuse and recycling objectives of the integrated solid waste management plan enacted by county government If the Court reverses the decision of the Second Circuit, as urged by Petitioners, the ability of state and local governments

1 No person or entity other the Amicus Curiae or its counsel made a monetary contribution to the preparation or submission of this brief Written consent to file this brief has been provided by both parties

2 *See* N Y Pub Auth Law, §§ 2053-a et seq (McKinney 2006)

3 *See* N Y Pub Auth Law, §§ 2049-tt, 2053-v(2) (McKinney 2006), Res Br 5

to provide public services through the well-established and heretofore legally protected public monopoly structure will be seriously impaired. RCSWMA, as Amicus Curiae, therefore, urges the Court to affirm the decision below.

Rockland County, New York is a largely suburban community located sixteen miles northwest of New York City Rockland County is home to five towns and nineteen villages with a total of approximately 292,916 residents. RCSWMA serves these municipalities through five publicly owned state-of-the-art solid waste management facilities operated by a combination of employees and private contractors. These facilities include a household hazardous waste facility, a materials recovery facility, a co-composting facility, a yardwaste composting facility, and a transfer station and preprocessing facility. The five facilities together process more than 220,000 tons of solid waste per year

The Rockland County integrated solid waste management plan was enacted to address the continued increase in the County's production of solid waste and the impending closure of the County's municipal landfills. As mandated by state policy, the County's solid waste management plan was intended to reduce the total amount of landfilled material by increasing the amount of recycled solid waste Oversight by the RCSWMA and the establishment of its processing facilities has dramatically reduced the amount of solid waste ultimately required to be disposed at a landfill Unlike prior solid waste regulation, RCSWMA's public service monopoly in solid waste processing provides Rockland County residents with a single publicly accountable regulatory body responsible for the achievement of legislatively established environmental goals Maintenance of RCSWMA's public service monopoly structure is vital to the conservation of Rockland County's environment and the continued health of Rockland County residents.

SUMMARY OF THE ARGUMENT

It is long-standing Supreme Court precedent that state and local governments may establish public service monopolies to enforce the police power without incurring liability under federal anti-trust restrictions The state action exemption from the Sherman Act reflects the Court's acknowledgment that the displacement of competition by a state as a means of enforcing its police power is an attribute of state sovereignty. By contrast, the dormant Commerce Clause was established by the Court to restrict states from exercising their power as sovereigns to promote parochial economic interests to the detriment of interstate commerce.

Petitioners seek a decision from this Court invalidating Respondents' public service monopoly in solid waste processing as a violation of the dormant Commerce Clause However, Respondents' public service monopoly is not motivated by economic protectionism but by a state environmental policy to reduce solid waste and advance the general well-being of the public The issues presented here test the balance between the Court's constitutional role as a safeguard of our federalist system and its assumed duty to limit state sovereignty to the extent it impairs the national economy

By displacing competition, public service monopolies permit state and local governments to enforce the police power through the implementation of uniform policies and procedures In the more than one hundred years since it enacted the Sherman Act, Congress has not seen fit to use its commerce power to restrict states' use of public service monopolies to enforce the police power. Furthermore, in its anti-trust jurisprudence, this Court has consistently interpreted Congress' inaction as recognition of state sovereignty

Respondents' displacement of competition in the market for solid waste processing is a valid exercise of the police power that does not result in differential treatment of intrastate as compared to interstate commerce Invalidation of Respondents' public service monopoly would therefore expand the scope of the dormant Commerce Clause – a judicial restriction of state sovereignty – to include anti-competitive conduct that the Court has previously accepted as a legitimate exercise of state authority Such an increased limitation of states' authority would irreparably disrupt the balance of federal and state power that is the mainstay of our federalist system

ARGUMENT

I. The State Action Exemption From Anti-Trust Restrictions, Long Recognized By The Court As An Attribute Of State Sovereignty, Should Not Be Eroded By An Unwarranted Extension Of Dormant Commerce Clause Jurisprudence

In response to anti-competitive business activity that consolidated wealth and power in the hands of a few individuals and corporations, Congress enacted the Sherman Act in 1890 by a nearly unanimous vote *See Standard Oil Co v United States*, 221 U S 1, 50, 31 S Ct 502, 512, 55 L Ed 619 (1911), Sherman Act, ch. 647, 26 Stat 209 (1890) The Sherman Act prohibits the "restraint of trade or commerce among the several states," Sherman Act, 15 U S C § 1 (2006), and codifies the notion generally held at common law that contracts in restraint of trade undermine "unfettered competition as the rule of trade" and are inimical to economic liberty. *N Pac Ry Co v United States*, 356 U S 1, 4, 78 S. Ct 514, 518, 2 L Ed 2d 545 (1958) It is generally

accepted that the Sherman Act is the *magna carta* of free enterprise *City of Lafayette, La v La Power & Light Company*, 435 U.S. 389, 398, n.16, 98 S Ct 1123, 1129, 55 L. Ed. 2d 364 (1978) (citing *United States v Topco Assoc*, 405 U.S. 596, 610, 92 S Ct 1126, 1135, 31 L. Ed 2d 515 (1972)) Its primary objective is to "secure equality of opportunity and to protect the public against evils commonly incident to monopolies which tend to directly suppress the conflict for advantage called competition . . ." *United States v Am Linseed Oil Co*, 262 U.S 371, 388, 43 S Ct 607, 67 L Ed. 1038 (1923).

The Fifty-First Congress' intent in passing the Sherman Act was examined by this Court in *Parker v Brown*, 317 U S 341, 63 S Ct 307, 87 L Ed 315 (1943) There, the Court concluded that, while the Act prohibits anti-competitive activity by individuals and corporations, there was no evidence that Congress intended that prohibition to extend to official or state action even if it resulted in the restraint of trade It was there recognized that the states were immune, when acting in their governmental capacity, from federal anti-trust prosecutions pursuant to the Sherman Act *Id* at 351 The state action exemption, as it is commonly known, is derived from the constitutional principles of federalism and state sovereignty *Id* at 350-51 Notwithstanding the powers delegated to the federal government by the Constitution, "the powers reserved to the several States extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State " *The Federalist* No 45, at 258 (Alexander Hamilton) (E H Scott ed. 1898) State action anti-trust immunity permits states to impose anti-competitive

restraints or regulations in their sovereign capacity *See Genentech, Inc v Eli Lilly and Co* , 998 F.2d 931, 948 (Fed. Cir 1993), *cert denied sub nom Regents of Univ of Cal v Genentech, Inc* , 510 U S 1140, 114 S. Ct. 1126, 127 L Ed 2d 434 (1994), *overruled on other grounds by Wilton v Seven Falls Co* , 515 U S 277, 115 S Ct 2137, 132 L Ed 214 (1995) Anti-competitive legislation adopted by state legislatures is therefore *ipso facto* exempt from federal anti-trust laws *See Hoover v Ronwin*, 466 U S. 558, 567-68, 104 S Ct 1989, 1995, 80 L Ed. 1989 (1984).

Although municipal corporations are not recognized in all respects as sovereign entities and do not enjoy the full constitutional protections afforded the states, the state action exemption has been deemed applicable to anti-competitive conduct by municipalities to the extent that they act as political subdivisions of the state *See City of Lafayette*, at 413. A municipal corporation is exempt from anti-trust laws so long as the anti-competitive activity is authorized by a "state policy to displace competition with regulation or monopoly public service " *Id* at 413 Thus, a municipal entity will not be liable in anti-trust where a state has a clearly articulated anti-competitive policy or even where it is merely foreseeable that anti-competitive conduct may result from state legislation. *See Town of Hallie v City of Eau Claire*, 471 U S 34, 42, 105 S Ct 1713, 1718, 85 L Ed. 2d 24 (1985) *See also* Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-6 (2006) (exempting local governments and their agents from liability under the Clayton Act)

Supreme Court precedent unequivocally recognizes the authority of state and local governments to engage in monopolistic and other types of anti-competitive conduct to achieve a legislatively defined end In the instant matter, the

Court has been asked to consider the constitutionality of Respondents' regulatory scheme for the management of solid waste through a public monopoly in solid waste processing It is argued, among other things, that Respondents' monopoly in solid waste processing is injurious to Petitioners because it eliminates out-of-state processors from the solid waste processing market in Oneida and Herkimer Counties However, it is clear from the state action doctrine that local governments, such as Respondents, are allowed to displace competition pursuant to a duly enacted state policy

The New York State Legislature has clearly articulated a policy authorizing the displacement of competition in the area of solid waste management through regulation and the provision of services by county government [4] The New York Solid Waste Management Act expressly provides for the adoption of solid waste management plans by local governments to advance the state's overall solid waste reduction, disposal, and recycling goals. *See* N.Y. Envtl Conserv Law §§ 27-106-07 (McKinney 2006) The New York State Legislature has also authorized the creation of solid waste management authorities such as RCSWMA and Oneida-Herkimer Solid Waste Management Authority to implement such plans *See* N Y Pub. Auth Law, §§ 2049-aa et seq., 2053-a et seq. (McKinney 2006). In addition "to further the governmental and public purposes of the authorit[ies]," the State has empowered Rockland, Oneida, and Herkimer Counties to adopt "local laws, ordinances and regulations imposing appropriate and reasonable limitations

4 The New York State Public Authorities Law explicitly declares that it is State policy "in the area of the control and management of solid waste to displace competition with regulation or monopoly control " N Y Pub Auth Law, §§ 2049-tt, 2053-v(2) (McKinney 2006)

on competition with respect to collecting, receiving . . [or] processing . solid waste." N.Y. Pub. Auth Law, §§ 2049-tt, 2053-v(2) (McKinney 2006).

Petitioners contend that Respondents cannot use a public monopoly structure to exert a regulatory affect in the market for solid waste management services because doing so constitutes an impermissible interference with interstate commerce. *See* Pet Br 30 But because Respondents have imposed regulatory restraints on the market for waste processing at the direction of the State, the state action exemption and the constitutional principles on which it relies instruct that Petitioners are not entitled to relief for any alleged restriction of their economy liberty *See Hancock Indus v Schaeffer*, 811 F.2d 225 (3d Cir 1986), *Town of Hallie*, 471 U S. at 34.

The Commerce Clause vests Congress with the power to regulate commerce among the states U S Const art I, § 8, cl. 3. However, as illustrated by the Sherman Act and this Court's state action exemption jurisprudence, Congress' power to regulate interstate commerce does not entirely foreclose the power of the states to affect commerce within their borders. Rather, "under our constitutional system, there necessarily remains to the States, until the Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected " *Breard v City of Alexandria, La* , 341 U S. 622, 634, 71 S. Ct 920, 928, 95 L Ed 1233 (1951) In giving Congress the authority to regulate commerce, the Framers did not intend to prohibit "the States from legislating on all subjects relating to the health, life and safety of their citizens " *Huron Portland Cement Co v City of Detroit*, 362 U S. 440, 443, 80 S Ct. 813, 816, 4 L Ed 2d 852 (1960)

Given the limits of Congress' commerce power, invalidation of public service monopolies under the dormant Commerce Clause seems unwarranted

Despite the positive power conferred to Congress by the Constitution to regulate interstate commerce, the Court has "consistently held this language to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state . . . [legislation] even when Congress has failed to legislate on the subject " *Okla Tax Comm'n v Jefferson Lines*, 514 U.S 175, 179, 115 S. Ct 1331, 1335, 131 L. Ed. 2d 261 (1995), *reh'g denied* 514 U S 1135, 115 S Ct. 2018 (1995) The Court developed the dormant Commerce Clause to restrain states' exercise of their sovereign power but only insofar as states attempted to use their authority to promote private economic interests *See H P Hood & Sons, Inc v Du Mond*, 336 U S 525, 539, 532, 69 S. Ct 657, 666, 93 L. Ed 865 (1949) Through the continued application of the state action exemption, this Court has acknowledged that Congress "has done nothing to limit its unbroken recognition of the state regulatory authority that has created and preserved [. . .] local monopolies " *General Motors Corp v Tracy*, 519 U.S. 278, 305, 117 S Ct 811, 827, 136 L. Ed. 761 (1997) (recognizing the value of state-regulated monopolies for the sale and distribution of natural gas)

Petitioners argue that states and their political subdivisions do not have the authority to displace competition by establishing public monopolies to enforce the police power. *See* Pet Br. 25 If the Court were to accept Petitioners' argument, such a decision would result in a distinct incongruity between the recognition of state sovereignty in the exercise of the police power under the state action

exemption and the restraints imposed on state power by the Court's effort to curtail economic protectionism under the dormant Commerce Clause. The Court's anti-trust jurisprudence supports the proposition that principles of state sovereignty and federalism remove non-discriminatory public monopolies and their attendant regulations from the scope of dormant Commerce Clause restrictions.

II. Public Monopolies Designed To Implement Police Power And Which Even-Handedly Displace Competition Do Not Discriminate Against Interstate Commerce

The primary objective of the Commerce Clause was to ensure that "every farmer and every craftsman [would] be encouraged to produce by the certainty that he [would] have free access to every market in the Nation " *H P Hood & Sons, Inc* , 336 U.S. at 539 Accordingly, state legislation enacted for the purpose of improving a state's individual economic position to the detriment of all others violates the dormant Commerce Clause *Id* at 534-35 However, the Framers' goal of protecting interstate commerce "stands in sharp contrast to their jealous preservation of power over their internal affairs . . . There was no desire to authorize federal interference with social conditions or legal institutions of the states " *Id* at 533-34 To that end, the Commerce Clause does not constitute a surrender of the states' police power which confers broad authority "to prescribe regulations to promote the health, peace, morals, education, and good order of the people " *Barbier v Connolly*, 113 U.S 27, 31, 5 S Ct 357, 360, 28 L Ed 923 (1884) *See also R R Co v Husen*, 95 U S 465, 470-71, 24 L. Ed 527 (1877)

State legislation that is within the police power and is motivated by a state's obligation to protect the welfare of its

citizens, rather than economic protectionism, will be upheld notwithstanding adverse impacts on interstate commerce. *See Breard*, 341 U S 622. Public monopolies are a longstanding tool of municipal and state governments to impose regulation or provide services that are in the interest of the public welfare *New State Ice Co v Liebmann*, 285 U.S. 262, 304, 52 S Ct 371, 384, 76 L Ed 747 (1932) The municipal management of solid waste through regulations and exclusive franchises in particular has long been considered within the scope of states' police power *See Cal Reduction Co , v Sanitary Reduction Works of San Francisco*, 199 U S. 306, 26 S Ct 100, 50 L Ed 204 (1905). Because Respondents' public service monopoly in solid waste processing was created pursuant to a state policy dedicated to implementing the state's environmental policies, it is not within the ambit of the harm the Framers sought to avert by means of the Commerce Clause.

In dormant Commerce Clause jurisprudence a discriminatory state regulation is one that results in "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter " *Or Waste Sys , Inc v. Dep't of Envtl Quality of Or*, 511 U S 93, 99, 114 S. Ct. 1345, 1350, 128 L Ed 2d 13 (1994) Because discriminatory state regulations promote parochial interests and disrupt the national economy, such regulations are subject to a "virtually per se rule of invalidity " *Philadelphia v New Jersey*, 437 U.S. 617, 624, 98 S. Ct 2531, 2535, 57 L. Ed 2d 475 (1978) State and local regulatory schemes that displace competition and establish public monopoly services are non-discriminatory. *See USA Recycling, Inc v Town of Babylon, Inc* , 66 F 3d 1272 (2d Cir 1995), *cert denied*, 517 U.S 1135, 116 S Ct 1419, 134 L Ed 2d 544 (1996) Government's exclusion of all private

actors from a given market affords in-state businesses no protection from or preference over out-of-state competitors.

The regulatory scheme enacted by Oneida and Herkimer Counties to implement their integrated solid waste management plan has eliminated the market for solid waste processing within their territorial jurisdiction Local haulers and Petitioners alike are mandated to use the public processing facility and are equally deprived of the opportunity to employ less costly processing services available in either the intrastate or interstate market *See* Res Br 30-1. The jurisdictional limitations of neutral local regulations do not in and of themselves result in differential treatment of local and national enterprises *See Hancock Indus* , 811 F.2d 225 Monopoly public services are indeed bound to geographic markets but this merely reflects the nature of our federalist form of government and provides no evidence that the limits of the state action exemption from anti-trust have been exceeded. *See id*

Unlike prior dormant Commerce Clause cases presented to the Court, this case involves a non-discriminatory monopoly in public services within a well-recognized area of the police power. As explained in *Barbier*, 113 U.S at 31-32. "Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good " The anti-competitive regulation at issue here is thus distinguishable from an import ban, *see Fort Gratiot Sanitary Landfill, Inc v Mich Dep't of Natural Res* , 504 U S. 353, 112 S. Ct. 2019, 119 L Ed 2d 139 (1992); *Philadelphia*, 437 U S 617, or a surcharge that discriminates between local and out-of-state

businesses, *see Or Waste Sys , Inc* , 511 U S 93, *Chem Waste Mgmt v Hunt*, 505 U S 334, 112 S Ct 2009, 119 L. Ed 121 (1992), or a regulation that directs solid waste to a local business to the exclusion of all others, *see C&A Carbone, Inc , v Town of Clarkstown*, 511 U.S 3838, 114 S. Ct 1677, 128 L. Ed. 2d 399 (1994) *See also* Lincoln L Davies, Note, *If You Give The Court A Commerce Clause An Environmental Justice Critique Of Supreme Court Interstate Waste Jurisprudence*, 11 Fordham Envtl. L.J 207, 233-42 (1999) While Petitioners have focused on the anti-competitive nature of Respondents' public service monopoly, it is evident that not every restraint on trade - especially one whose detrimental effect on out-of-state and local businesses is identical - implicates the Commerce Clause *See H P Hood & Sons*, 336 U S 525.

III. The Preservation Of Public Monopolies Is Essential To Our Federalist Form of Government

The provision of public services and the enforcement of regulations by local government to protect the public welfare – especially the public health – is a tradition that was established in the colonies well before the adoption of the Constitution. *See* Wendy E Parmet, *Health Care and the Constitution Public Health and the Role of the State in the Framing Era*, 20 Hastings Const. L.Q 267, 290 (1992) (discussing a Massachusetts solid waste regulation from 1634) "When the Federal Constitution was adopted in 1789, it was an established fact that the states possessed the right to take suitable measures for the preservation of the health of their citizens." James A Tobey, *Public Health and the Police Power*, 4 N Y U L Rev 126, 126 (1927) The reservation of the police power to the states is an elemental aspect of our federalist system inasmuch as it demarcates

the bounds of state and federal government *See Gibbons v Ogden*, 9 Wheat 1, 6 L Ed. 23, 71 (1824). The states' police power is so integral to our form of government that it has even been asserted that "[M]uch of what citizens of the United States take for granted including . the security of the social order, the enjoyment of private life and property and most notably the health of the community, are dependent upon the exercise of power by state governments " James G. Hodge, Jr., *The Role of New Federalism and Public Health Law*, 12 J. L & Health, 309, 322 (1998) The power to regulate in order that the well-being of the public be preserved has even come to be recognized by some as an obligation of local government. Tobey, *supra* at 126 State and local governments' reliance on the public monopoly structure to effectuate the police power is equally well-established *See New Orleans Water-Works, Co v Rivers*, 115 U.S 674, 6 S Ct 273, 29 L Ed 525 (1885). *See* discussion *supra* Point I

The anti-competitive monopoly structure provides a mechanism by which state and local governments can implement uniform standards and procedures to ensure the general welfare of the public *See e g Slaughter-House Cases*, 83 U.S 36, 21 L Ed 394, 16 Wall 36 (1872), Res. Br 35 The displacement of competition allows state and local governments to regulate in a manner that is sufficiently comprehensive to secure the public good *See General Motors Corp* , 519 U.S at 290; *Town of Hallie*, 471 U.S. at 39 Respondents' public service monopoly in solid waste processing allows them to regulate the "waste stream" and to make certain the Counties fulfill their governmental obligation to maximize waste reduction and recycling. *See* Res Br. 36. Furthermore, the partial monopoly structure adopted by Oneida and Herkimer Counties permits

local government to exert a regulatory affect on solid waste management but does not require the Counties to expend the resources necessary to occupy an entire market.

The Court's state action precedent permits state and local governments to displace competition in an entire market regardless of any anti-competitive affect on the marketplace. *See Parker*, 317 U S. 341 Acceptance of Petitioners' arguments would judicially endorse the proposition that state and local governments cannot displace competition with a partial monopoly if doing so has an anti-competitive but non-discriminatory effect on related sectors of the market. From a practical perspective, state and local governments would be forced to either operate a complete public service monopoly that eliminated a market in its entirety or simply abandon public services in that area altogether regardless of the impact on public health. This all or nothing result would do little to further the economic liberty of those in the private sector While total public monopolies present limited opportunities for private sector participation through the contracting out of various services, the partial public monopoly structure enables state and local governments to regulate an industry by strategically displacing competition in a discrete area even as unfettered competition remains the rule of trade in the remainder of the market. Ironically, it is the latter approach, one that leaves a substantial sector of the industry open to free commerce, that Petitioners seek to foreclose in the name of economic liberty.

Constraining state and local governments' ability to regulate through anti-competitive conduct would inevitably diminish their capacity to exercise the police power effectively. The debilitation of what may be the primary

function of state and local governments should only be undertaken with complete certainty that doing so conforms with the form and substance of the theory of governance espoused by the Constitution A ruling in favor of Petitioners would be disruptive to our constitutional framework

To the extent Congress has spoken, it has elected not to preclude state and local governments' use of non-discriminatory public service monopolies *See* discussion *supra* Part I. At the core of Petitioners' claim lies the assertion that the Court should interpret Congress' silence as a prohibition against state enforcement of the police power through the displacement of competition *Contra Tyler v Pipe Indus v Wash State Dep't of Revenue*, 483 U S 232, 262 (1987) (Scalia, J , concurring in part, dissenting in part). *See* Pet Br 40 This particular incantation of the dormant Commerce Clause, however, finds little support in our Constitution and only intermittent support in the decisions of the Court *Id* Unlike other doctrines that inform the understanding of our system of governance, the dormant Commerce Clause is a judicial creation that should be employed with prudence. *See Tyler*, 483 U.S. at 257. Economic protectionism, the concern that motivated the Court's development of the dormant Commerce Clause, is conspicuously absent from the facts presented here. *See New Energy Co of Ind v Limbach*, 486 U S. 269, 273, 108 S. Ct 1803, 1807, 100 L. Ed 2d 302 (1988) Furthermore, this Court has already had occasion to interpret Congress' silence as to non-discriminatory, anti-competitive conduct by state and local governments exercising the police power and has held that such conduct is permissible. Given the foregoing, and that Congress has expressly recognized that it is the primary role of state and local as opposed to federal government to regulate solid waste management,

see Resource Conservation and Recovery Act, 42 U S C. § 6901(a)(4) (2006), it would seem evident that state and local governments can establish either a total or a partial non-discriminatory public monopoly to regulate and provide solid waste management services

For the Court to hold that non-discriminatory, anti-competitive regulation of solid waste management by state and local governments violates the dormant Commerce Clause, despite legislative and judicial evidence to the contrary, would implicate the doctrine of separation of powers and further complicate fundamental notions of federalism. *See* Davies, *supra*, at 250-51 Respondents' regulatory conduct must either be within the scope of Congress' enumerated powers or the within the purview of those powers reserved to the states; our federalist system dictates that it cannot lie within both Petitioners argue that *stare decisis* demands that the Court hold in their favor But a determination that state and local governments cannot displace competition to enforce the police power would extend the dormant Commerce Clause's restraint on state power beyond instances of economic protectionism and erode the capacity of states to operate as sovereigns within their sphere of governance

CONCLUSION

For the foregoing reasons, and those set forth in Respondents' brief, the judgment of the Court of Appeals should be affirmed

Respectfully submitted,

BRIDGET GAUNTLETT
General Counsel
ROCKLAND COUNTY SOLID
WASTE MANAGEMENT AUTHORITY
420 Torne Valley Road
Hillburn, NY 10931

ROBERT BERGEN*
TENO WEST
LEAH GRIGGS PAULY
HOLLAND & KNIGHT LLP
195 Broadway
New York, NY 10007
(212) 513-3200

Attorneys for Amicus Curiae

* *Counsel of Record*

6049

No. 05-1345

IN THE

Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., and INGERSOLL PICKUP INC.,

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, and COUNTY OF HERKIMER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AMICI CURIAE SUSSEX COUNTY, VIRGINIA AND CHARLES CITY COUNTY, VIRGINIA IN SUPPORT OF PETITIONERS

HENRY A. THOMPSON, SR.
SUSSEX COUNTY ATTORNEY
P.O. Box 342
108 Maifeld Ave.
Waverly, VA 23890
(804) 834-2780

JONATHAN S. FRANKLIN*
KIMBERLY S. WALKER
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466

B. RANDOLPH BOYD
CHARLES CITY COUNTY ATTORNEY
14 E. Main Street
Richmond, VA 23219
(804) 643-6611

* Counsel of Record

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE AND MARKET FORCES HAVE FOSTERED A VIBRANT INTERSTATE MARKET IN WASTE PROCESSING AND DISPOSAL	5
II. ADOPTING THE SECOND CIRCUIT'S REASONING WILL ADVERSELY AFFECT AMICI AND OTHER JURISDICTIONS THAT HAVE DEPENDED ON THE LEGAL CERTAINTY PROVIDED BY *CARBONE*	11
A. Landfills Accepting Interstate Waste Have Provided Substantial Economic Benefits To Amici And Their Citizens	11
B. Amici And Their Citizens Would Be Harmed If Localities Could Evade The Holding In *Carbone* Simply By Taking Title To Processing And Disposal Facilities	15
CONCLUSION	19

TABLE OF AUTHORITIES

Page

CASES:

C & A Carbone, Inc. v. *Town of Clarkstown*, 511 U.S. 383 (1984) ..... *passim*

Chemical Waste Mgmt., Inc. v. *Hunt*, 504 U.S. 334 (1992) 5

Philadelphia v. *New Jersey*, 437 U.S. 617 (1978) 5

Fort Gratiot Sanitary Landfill, Inc. v. *Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992) 5

H.P. Hood & Sons, Inc. v. *Du Mond*, 336 U.S. 525 (1949) 10

Hughes v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976) 17

Hughes v. *Oklahoma*, 441 U.S. 322 (1979) 17

Oregon Waste Sys., Inc. v. *Dep't of Envtl. Quality*, 511 U.S. 93 (1994) 5

Prudential Ins. Co. v. *Benjamin*, 328 U.S. 408 (1946) 18

Quill Corp. v. *North Dakota*, 504 U.S. 298 (1992) 17, 18

Waste Mgmt. Holdings, Inc. v. *Gilmore*, 252 F.3d 316 (4th Cir. 2001), *cert. denied*, 535 U.S. 904 (2002). 3

LEGISLATIVE MATERIAL:

Interstate Transportation of Municipal Solid Waste: Hearing on S. 533, S. 663, and S. 872 Before the Sen. Comm. on Environment and Public Works, 106th Cong., 1st Sess. (1999) ..... *passim*

TABLE OF AUTHORITIES—Continued

	Page
***OTHER AUTHORITIES*:**	
Robert Burke, *Cash For Trash*, Virginia Business, Nov. 1998	*passim*
Congressional Research Service, *Interstate Shipment of Municipal Solid Waste: 2004 Update* (2004)	6, 8, 18
County of Sussex Virginia, *Comprehensive Annual Financial Report for Fiscal Year Ended June 30, 2005* (2005)	12
EPA, *Municipal Solid Waste in the United States 2005* (2006)	6
EPA, *Landfill Methane Outreach Program* (http://epa.gov/lmop/benefits.htm)	14
EPA, *Turning a Liability into an Asset: A Landfill Gas-To-Energy Project Development Handbook* (1996) (http://www.epa.gov/lmop/res/pdf/hand_1.pdf)	14
Ingenco, *Green Power* (http://www.ingenco.com/grn.html)	14
Richard C. Porter, *The Economics of Waste* (2002)	*passim*
National Economic Research Associates, *The Cost of Flow Control* (May 1995)	8, 9
Edward W. Repa, *Interstate Movement of Municipal Solid Waste*, NSWMA Research Bulletin 05-2 (Jan. 2005)	7, 16
Warren Fisk, *Virginia Brings in Record Haul of Garbage*, The Virginian-Pilot, May 28, 2002	13
Lawrence Latane III, *Landfill Seen as Power Source*, Richmond Times-Dispatch, July 24, 2006	13, 14

TABLE OF AUTHORITIES—Continued

Page

Tina McCloud, *Landfill Gas Will Profit Gloucester: Board OKs Methane Sale*, Daily Press, Apr. 3, 2003 14

Matt Sabo, *County Could Benefit from Methane Sale*, Daily Press, May 20, 2005 ..... 13, 14

Calvin R. Trice, *Avian Outbreak Difficult to Stop*, Richmond Times-Dispatch, May 13, 2002 13

U.S. Census Bureau, 2000 Census (http://www.census.gov/main/www/cen 2000.html) 2, 3

Virginia Dep't of Envtl. Quality, *Report on the Management of Municipal Solid Waste in the Commonwealth of Virginia* (Nov. 1998) 3, 8, 9

Virginia Dep't of Envtl. Quality, *Solid Waste Managed in Virginia During Calendar Year 2005* (June 2006) 7, 15

Virginia Dep't of Envtl. Quality, *Using Landfill Gas for Fuel and Energy* (Sept. 18, 2006) 14

Waste News, *Top 25 Largest Landfills* (http://www.wastenews.com/rankings/la nd fills_cap2004.html) 2

Steve Webb, *Virginia County Misses: New York City Trash*, Waste Age, May 1, 1999 9

IN THE

Supreme Court of the United States

No. 05-1345

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., and INGERSOLL PICKUP INC.,

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, and COUNTY OF HERKIMER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AMICI CURIAE SUSSEX COUNTY, VIRGINIA AND CHARLES CITY COUNTY, VIRGINIA IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae Sussex County and Charles City County are two predominantly rural counties located in Southeast Virginia.[1] Amici have an interest in this case because both

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici curiae or their counsel, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of the parties, whose letters of consent have been filed with the Clerk.

counties contain economically efficient, state-of-the-art, and environmentally sensitive landfills that are used to dispose of substantial amounts of out-of-state solid waste. Revenues from these landfill operations constitute a significant proportion of both counties' total governmental revenues, which are used to fund needed public services for their citizens. Amici are concerned that the decision below, if affirmed by this Court, would cause localities throughout the country to enact similar protectionist measures in an effort to hinder the free flow of interstate commerce. Such a development would threaten the viability of the existing interstate waste disposal market, which in turn would harm amici, their citizens, and all other jurisdictions with waste disposal facilities that depend on this interstate commerce. Amici therefore urge this Court to reaffirm its decision in *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383 (1994), and confirm that localities cannot stifle interstate commerce to serve their own parochial, protectionist economic interests.

Founded in 1754, Sussex County is a largely rural county located about 45 miles southeast of Richmond, Virginia. Approximately 12,500 people live in Sussex County and it covers 491 square miles of land. The county's population density is only 26 people per square mile, and the median household income is just over $30,000. *See* U.S. Census Bureau, 2000 Census. Its economy is largely based on agriculture and agriculture-based manufacturing. Sussex County also contains a large commercial landfill, which occupies 1,315 acres, approximately 374 of which are active. The site has the capacity to hold approximately 137 million additional tons of waste material, making it the second largest landfill in the nation in terms of remaining capacity. *See* Waste News, *Top 25 Largest Landfills* (http://www.wastenews.com/rankings/land fills_cap2004.html). Approximately 86% of the waste disposed of at the site is from other states.

Incorporated in 1634, Charles City County is a largely rural county located just east of Richmond. Approximately 7,000

people live in Charles City County—an increase of only 1,334 people since the Nation's first census in 1790—and it covers approximately 183 square miles of land. The county's population density is approximately 38 people per square mile, and the median household income is just over $42,000. *See* U.S. Census Bureau, 2000 Census. Like Sussex County, Charles City County contains a large commercial landfill. This landfill spans 934 acres, and has the potential for 45 million cubic yards of waste material. *See* Virginia Dep't of Envtl. Quality, *Report on the Management of Municipal Solid Waste in the Commonwealth of Virginia* 86 (Nov. 1998) (hereinafter "*Virginia MSW Report 1998*"). Approximately 60% of the waste currently disposed of at the site is from other states.

Recognizing the significant losses likely to result from state and local limits on interstate trade in municipal solid waste ("MSW"), Charles City County has previously opposed flow control laws. When Virginia sought to curb the import of MSW into its borders by placing caps on the amount that could be received at landfills in the Commonwealth and limits on the method of transporting MSW, Charles City County and other plaintiffs filed suit. Applying this Court's strict scrutiny analysis for statutes that facially, or in their practical effect, discriminate against interstate commerce, the Fourth Circuit upheld the invalidation of several of the challenged statutes. *See Waste Management Holdings, Inc.* v. *Gilmore*, 252 F.3d 316 (4th Cir. 2001), *cert. denied*, 535 U.S. 904 (2002).

SUMMARY OF ARGUMENT

In response to market forces, a vibrant interstate market for the processing and disposal of municipal solid waste has grown up in the wake of this Court's decision in *Carbone*. The number of states exporting municipal solid waste has risen from only fourteen prior to *Carbone* to virtually all states today. Because this interstate market is sensitive to

local restrictions on the export of waste, it is important for there to be legal certainty regarding the unlawfulness of flow control ordinances. If, as the Second Circuit held, jurisdictions can evade *Carbone* simply by taking title to local disposal facilities, investment in interstate facilities will be deterred and the national market in waste disposal will likewise be hindered.

In its decision, the Second Circuit relied to some degree on its understanding that "out-of-state processors * * * have not complained," about respondents' ordinances and that "there is no indication the deprivation [of interstate commerce] represents a meaningful economic loss." Pet. App. 48a. Amici have therefore filed this brief to make clear that there *are* in fact out-of-state interests opposed to flow control ordinances, and that this curtailment of interstate commerce—particularly if replicated throughout the nation—will in fact result in a meaningful economic loss for out-of-state disposal facilities that depend on interstate commerce. Just as there were governmental entities opposed to the ordinance struck down in *Carbone*, 511 U.S. at 384 n.*, so too are there governmental entities opposed to the essentially identical restrictions at issue in this case. If amici and similarly situated jurisdictions cannot be assured of the volume of interstate shipments needed to render their facilities economically viable, there will be an incentive for them to retaliate by similarly hoarding their own local waste. The Commerce Clause was intended to prevent just such interstate trade wars.

Where, as here and in *Carbone*, Congress has not clearly approved of discriminatory flow control measures, this Court's precedents require invalidation of such restrictions on interstate commerce, regardless of whether they favor private or publicly owned facilities. If localities still desire to enact such ordinances, they are free to continue to seek approval from Congress—approval that Congress has so far declined to provide. In the meantime, however, this Court should reaffirm *Carbone*, which has provided critical legal

certainty for amici and other jurisdictions that have invested in, and depend on, this interstate commerce.

ARGUMENT

I. THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE AND MARKET FORCES HAVE FOSTERED A VIBRANT INTERSTATE MARKET IN WASTE PROCESSING AND DISPOSAL.

In 1978, this Court held that the Commerce Clause prevents the individual states from unjustifiably burdening the interstate market for the disposal and processing of municipal solid waste. *See Philadelphia* v. *New Jersey*, 437 U.S. 617, 629 (1978) (state may not claim the right to seal its borders to interstate traffic in waste). Since then, this Court has continually invalidated state and local attempts to prohibit, hinder, or discriminatorily tax the import of waste into their jurisdictions. *See, e.g., Ft. Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992) (invalidating state and local laws that granted counties the option to prohibit import of solid waste); *Chemical Waste Management, Inc.* v. *Hunt*, 504 U.S. 334 (1992) (Commerce Clause prohibits state from imposing a differential fee structure for imported hazardous waste); *Oregon Waste Sys. Inc.* v. *Dep't of Envtl. Quality*, 511 U.S. 93 (1994) (striking down state statute that imposed an additional disposal fee for solid waste generated outside the state).

Twelve years ago, this Court rendered its landmark decision in *Carbone*. Applying "well-settled principles of * * * Commerce Clause jurisprudence," 511 U.S. at 386, the Court invalidated a flow control ordinance requiring that all waste generated within a town's borders be processed at a specific facility designated by the town. *Id.* at 394-95. That facility was in all relevant respects a public facility, since the municipality had agreed to amortize its cost through the flow control ordinance, and to purchase the facility for one dollar after five years. *Id.* at 386. Noting that the Commerce

Clause "presumes a national market free from local legislation that discriminates in favor of local interests," the Court made clear that the Constitution mandates the "unobstructed flow of interstate commerce" except in the rarest of circumstances. *Id.* at 393.

Carbone, and the decisions that preceded it, have fostered a vibrant and growing interstate market for the processing and disposal of solid waste. Freed of discriminatory and protectionist attempts to prevent the import and export of waste, market forces have served to accommodate the increasing volume of waste in an economically efficient and environmentally sensitive manner. The market for processing and disposal of MSW is driven by a number of factors, such as the state of the national economy, transportation costs, reuse and recycling rates, environmental laws, and local factors such as climate and commercial activity. *See, e.g.*, Richard C. Porter, *The Economics of Waste* 102-117 (2002) (hereinafter "*The Economics of Waste*"); EPA, *Municipal Solid Waste in the United States 2005*, at 11 (2006) (hereinafter "*MSW 2005*"). But the primary drivers of this market are the ever increasing amount of waste generated by society and the decrease in the number of suitable places to dispose of it.

In 2005, Americans generated 245.7 million tons of MSW, and that number continues to grow along with the population. *See MSW 2005*, *supra*, at 1.[2] At the same time, however, the number of available landfills is diminishing. Between 1993 and 2002, the number of United States landfills declined by 54%. *See* Congressional Research Service, *Interstate Shipment of Municipal Solid Waste: 2004 Update* 11 (2004) (citation omitted) (hereinafter "*CRS Report*"). Many of the closed sites were small public landfills. *See* Robert Burke,

---

[2] Although the average rate of MSW generation per person has not shown a significant increase in the past few years, the volume generated in the United States is increasing, due in large part to the increase in the overall population. *See id.* at 4.

Cash For Trash, Virginia Business, Nov. 1998, at 3 (hereinafter "*Cash for Trash*"). These landfills closed because they reached their capacity, violated environmental laws, or could not compete with private landfills. *Id.*

Interstate commerce has met this market demand, fostered by this Court's constant vigilance in enforcing the Constitution's guarantee against local protectionist measures. After *Carbone*, the interstate market for processing and disposal of municipal solid waste expanded significantly. In 1989, only thirteen states and the District of Columbia exported MSW to another jurisdiction. *See* Edward W. Repa, *Interstate Movement of Municipal Solid Waste*, NSWMA Research Bulletin 05-2, at 6 (Jan. 2005) (hereinafter "*NSWMA Research Bulletin*"). And in that same year, only fourteen states imported MSW from other jurisdictions for disposal. *Id.* at 7. By 2003, however, it was an entirely different story. The amount of MSW exported and imported tripled between 1989 and 2003, with 47 states and the District of Columbia exporting MSW and 44 states importing MSW for disposal. *Id.* at 2, 6, 7.

Thus, virtually every state in the continental United States now participates in this interstate market, and nearly 10% of all MSW generated in the United States currently enters interstate trade. *See The Economics of Waste*, *supra*, at 103 (2002); *NSWMA Research Bulletin 05-2*, *supra*, at 2. This trade is extremely beneficial both for those jurisdictions that need a place to send their waste and for those that are positioned to accept it. In 2005, for example, ten counties in Virginia (including amici) reaped economic benefits totaling more than $42.9 million from the construction and operation of regional waste management facilities within their borders that accept MSW from out of state. *See* Virginia Dep't of Envtl. Quality, *Solid Waste Managed in Virginia During Calendar Year 2005*, at 30 (June 2006) (hereinafter "*Virginia MSW Report 2005*").

Just as the Framers envisioned, this Court's Commerce Clause jurisprudence has been instrumental in ensuring the continued growth of this interstate commerce. In the absence of protectionist measures, market forces will dictate where waste will be disposed, depending on which disposal site is the most efficient location for a particular shipment. For example, although Illinois more than doubled its landfill capacity between 1995 and 2003, the MSW generated in the Chicago metropolitan area is routinely exported to Indiana and Wisconsin, because it is more efficient for that waste to cross state lines. *See CRS Report*, *supra*, at 10. Similarly, Virginia is now a substantial importer of MSW, most likely because Virginia is near several large metropolitan areas, is readily accessible by road, rail, and water, and has land costs that are generally lower than in other states in the region. *See Virginia MSW Report 1998*, *supra*, at 87; *see also The Economics of Waste*, *supra*, at 103 (noting that the optimal distance of transporting waste for disposal is a function of the relative price of land and cost of transport). Additionally, the landfill disposal fees (tipping fees) charged by Virginia landfill operators are among the lowest in the region. *See Virginia MSW Report 1998*, *supra*, at 87.

Local fees and restrictions, however, have a significant effect on these market forces. These include both import and export restrictions. For example, although Pennsylvania remains the largest importer of MSW, the amount imported to that Commonwealth decreased when Pennsylvania imposed a new $5 per ton state fee on all waste disposed of within the state. *See CRS Report*, *supra*, at 7. Export restrictions likewise threaten the efficiencies engendered by interstate commerce. Flow control ordinances, by definition, disrupt the flow of interstate commerce. *See* National Economic Research Associates, *The Cost of Flow Control*, at 1-2 (May 1995) (hereinafter "*NERA Report*"). Flow control ordinances increase the average tipping fee by approximately $10 per ton, or 33%. *Id.* at 1. In the absence of flow control,

MSW would be shipped elsewhere to save on disposal costs. *Id.* at 2.

Because of their nature, large-scale regional landfills, like those in Sussex and Charles City counties, are often sited in rural but easily accessible areas that have small populations and low population densities. *See, e.g., Cash for Trash, supra*, at 2-3; *Virginia MSW Report 1998, supra*, at 86-87; *The Economics of Waste, supra*, at 102-103. These jurisdictions may be the most economically efficient and environmentally desirable sites for landfills. *See Virginia MSW Report 1998, supra*, at 86-88; *Interstate Transportation of Municipal Solid Waste: Hearing on S. 533, S. 663, and S. 872 Before the Sen. Comm. on Environment and Public Works*, 106th Cong., 1st Sess. 2 (1999) (statement of Sen. John Chafee) (hereinafter "*Senate Hearing*"); *NERA Report, supra*, at 5. Because these jurisdictions' own populations are small, however, their disposal facilities must depend for their economic viability on the continued availability of waste shipments from other areas. *See, e.g.*, Steve Webb, *Virginia County Misses: New York City Trash*, Waste Age, May 1, 1999; *Virginia MSW Report 1998, supra*, at 61-62.

Had *Carbone* been decided differently, many of these economically efficient regional facilities might never have been created. To be economically viable, MSW processing and disposal facilities require shipment volumes that many facilities, particularly those in rural areas, cannot meet with just their own waste. *See NERA Report, supra*, at 5. Flow control laws like the one invalidated in *Carbone* and the one at issue in this case are attempts by localities to disrupt the market's efficient allocation of resources. These laws hoard local waste at monopoly rates, at the expense of cheaper out-of-state facilities, in order to guarantee an economically beneficial volume that can support more expensive local facilities. *See id.*; *The Economics of Waste, supra*, at 110-11. When *Carbone* took the flow control option off the table, however, landfill operators were forced to compete in the

market. *See id.* at 111 (noting that "flow control is now a thing of the past"). The legal certainty provided by the Court has allowed the significant up-front investments needed for facilities, like those in Sussex County and Charles City County, that depend on interstate shipments. But market forces have also forced existing facilities to become more competitive. Although opponents of the ruling in *Carbone* suggested that numerous waste management facilities would go bankrupt without the ability to impose flow control, "the vast majority of facilities that previously relied on flow control have survived without it." *Senate Hearing*, *supra*, at 2 (statement of Sen. John Chafee).

The predictable result of prevailing market forces and this Court's continued safeguarding of interstate commerce has been the creation of large regional landfills and a concomitant increase in interstate shipment of MSW to those landfills. Although they may not have envisioned today's interstate commerce in waste disposal, this kind of uninhibited national market is precisely what the Framers intended. As Justice Jackson famously noted:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them.

H.P. Hood & Sons v. *Du Mond*, 336 U.S. 525, 539 (1949).

Amici have sited interstate waste disposal facilities in their jurisdictions predicated on the "certainty that [they] will have free access to every market in the Nation." *Id.* The Court should not disrupt that legal certainty by endorsing the Second Circuit's limitation of *Carbone* to laws favoring privately-owned facilities, for such a holding would effectively allow any jurisdiction to evade *Carbone* to the detriment of the national market and all those who depend on it.

II. ADOPTING THE SECOND CIRCUIT'S REASONING WILL ADVERSELY AFFECT AMICI AND OTHER JURISDICTIONS THAT HAVE DEPENDED ON THE LEGAL CERTAINTY PROVIDED BY *CARBONE*.

Contrary to the Second Circuit's understanding, upholding respondents' flow control ordinances will in fact result in "a meaningful economic loss," Pet. App. 48a, to amici and other jurisdictions with facilities that depend on the continued vitality of the interstate market in MSW processing and disposal. Amici will be particularly hard hit, since a significant proportion of their budgetary resources is derived from interstate commerce in waste disposal. Amici have depended on the safeguards provided by *Carbone*, and the Court should not abruptly remove them. If there are any remaining concerns about the propriety of flow control ordinances, respondents and other like-minded jurisdictions may continue to press their case in Congress, which has so far declined to endorse their protectionist proposals.

A. Landfills Accepting Interstate Waste Have Provided Substantial Economic Benefits To Amici And Their Citizens.

Sussex County. In 1994, Sussex County's two unlined landfills were nearly full and had to be closed. *See Cash for Trash*, *supra*, at 4. Additionally, closing those two landfills would cost the county more than $1 million. *Id.* To solve this problem, a commercial operator offered to build the county a state-of-the-art facility, one that exceeded state and federal environmental standards, and pay the county for each ton of waste disposed of at the new site. *Id.* In addition, the operator agreed to pay for half of the costs associated with closing Sussex County's old landfills and to build eight collection sites for county residents and businesses. *Id.*

Sussex County's decision to allow this regional landfill—which has the second largest capacity in the nation—has

been very beneficial for its citizens. In the past five years alone, the landfill has contributed nearly $30 million dollars to county revenues, and landfill fees currently account for 39% of total revenues. *See* County of Sussex Virginia, *Comprehensive Annual Financial Report for Fiscal Year Ended June 30, 2005*, at 60 (2005).

Charles City County. In the late 1980s, Charles City County had high real estate taxes and little private investment. *See Cash for Trash*, *supra*, at 3. The Commonwealth of Virginia demanded that the county's old landfill be closed due to newly enacted environmental regulations, but the cost of closing that landfill would require a large increase in the tax rate. *Id.*; *see also Senate Hearing*, *supra*, at 72 (statement of Floyd H. Miles, Sr., Chairman, Charles City County Board of Supervisors). The County therefore signed an agreement with a developer to develop a new commercial landfill, in hopes that the fees generated from those operations would help solve its fiscal dilemma. *See Cash for Trash*, *supra*, at 3. To induce a private company to develop the new landfill site, the County agreed that its new landfill would be open to MSW generated outside its borders. *See Senate Hearing*, *supra*, at 72 (statement of Floyd H. Miles, Sr.).

The deal paid off. Since the landfill began operations in 1990, Charles City County had collected over $40 million in payments as of 1999, *id.*, with an additional $16.5 million collected since then. Numerous other economic benefits have resulted. For example, the income has enabled the county to avoid imposing a gross receipts tax, which in turn has spawned development. *See Cash for Trash*, *supra*, at 3. In 1989, there were three companies in Charles City County's industrial park; by 1998, there were twenty-two. *Id.* Income generated from the landfill operations has enabled the county to completely replace its school facilities that were slated for loss of accreditation due the facilities' poor condition, to expand recreational programs for its citizens, and to provide much needed new office facilities for

the county government and the school board. *See Senate Hearing*, *supra*, at 72 (statement of Floyd H. Miles, Sr.).

Charles City County receives a substantial sum from its landfill operations. For the year 2005, the landfill in Charles City County generated approximately $2.7 million in revenue for the county. The average total economic benefit to the county derived from landfill operations is roughly $4 million annually, which represents approximately 15% of the county's annual budget.

The benefits of the Sussex and Charles City landfills also extend beyond their borders. Both facilities employ the latest technology and exceed both federal and state environmental standards. *See, e.g.*, *Senate Hearing*, *supra*, at 72 (statement of Floyd H. Miles, Sr.); *Cash for Trash*, *supra*, at 3; Warren Fisk, *Virginia Brings in Record Haul of Garbage*, The Virginian-Pilot, May 28, 2002. That is not surprising, since large facilities that accept substantial volumes of interstate waste—unlike many smaller local facilities—are designed to meet the highest environmental standards.[3] In fact, both counties' facilities have been deemed safe enough to accept poultry carcasses infected with avian influenza, thereby providing a critical service to localities that cannot dispose of this hazardous material themselves. *See* Calvin R. Trice, *Avian Outbreak Difficult to Stop*, Richmond Times-Dispatch, May 13, 2002, at B1.

Additionally, both counties operate landfill-to-energy facilities, which convert methane gas to electricity. *See, e.g.*, Lawrence Latane III, *Landfill Seen as Power Source*, Richmond Times-Dispatch, July 24, 2006, at B1; Matt Sabo,

---

[3] *See Senate Hearing*, *supra*, at 1-2 ("Interstate waste shipments have increased * * * due largely to the closure of hundreds of small landfills [that] were unable to comply [with] new stringent environmental standards. As a result, waste may be crossing state lines, but it is ending up in facilities that meet the highest standards.") (statement of Sen. John Chafee).

County Could Benefit from Methane Sale, Daily Press, May 20, 2005, at C1. Most landfills simply burn off methane gas, but amici's larger facilities, due to their economies of scale, can use this unwanted landfill byproduct to generate electricity that is sold to utility companies to help meet peak demand. *See* Ingenco, *Green Power* (http://www.ingenco.com/grn.html) (noting that Charles City County site produces landfill gas energy equivalent to four million gallons of fuel oil); Virginia Dep't of Envtl. Quality, *Using Landfill Gas for Fuel and Energy* (Sept. 18, 2006) (noting that Sussex County's landfill-to-energy project enabled it to reduce its air emissions by more than 4,000 tons in 2004); Lawrence Latane III, *supra*, at B1. Converting unwanted methane gas to electricity also conserves nonrenewable fossil fuels: a single facility can produce the energy equivalent of 1.2 million barrels of oil while reducing the greenhouse gas emissions typically generated in energy production. *See* Tina McCloud, *Landfill Gas Will Profit Gloucester: Board OKs Methane Sale*, Daily Press, Apr. 3, 2003, at C1. A single landfill-to-energy facility is "the equivalent of planting 126,000 acres of trees." Matt Sabo, *supra*, at C1. This benefits the entire nation.[4]

---

[4] The EPA estimates that between 60-90% of the methane gas emitted from a landfill may be converted to energy. *See* EPA, *Landfill Methane Outreach Program* (http://epa.gov/lmop/benefits.htm). Approximately 380 landfills nationwide are currently engaged in landfill-to-energy projects. *Id.* Because both size and the volume of waste received by a landfill affects its suitability for landfill-to-energy projects, amici's large regional landfills tend to be ideal candidates for landfill-to-energy facilities. *See* EPA, *Turning a Liability into an Asset: A Landfill Gas-To-Energy Project Development Handbook*, at 2-2 (1996). Without interstate commerce in MSW, however, it is unlikely that amici's landfills could maintain the volume of MSW necessary to ensure the economic viability of their landfill-to-energy operations. *See id.*

B. Amici And Their Citizens Would Be Harmed If Localities Could Evade The Holding In *Carbone* Simply By Taking Title To Processing And Disposal Facilities.

Both Sussex County and Charles City County depend on MSW that is shipped from out of state. Approximately 86% of the waste received at the Sussex County landfill originates from out of state. Consequently, approximately 86% of the revenue generated by that landfill is derived from out-of-state sources. The Charles City County landfill is similarly dependent on out-of-state MSW. Roughly 60% of the MSW received by that landfill—and a corresponding percentage of its revenue—is derived from sources out of state.

It bears noting that more than a quarter of the MSW imported into Virginia originated in New York, where respondents are located. *See Virginia MSW Report 2005*, *supra*, at i. Thus, even if only jurisdictions in New York were permitted to interfere with the export of MSW, the amount imported to Virginia would likely decrease significantly. If other jurisdictions receive this Court's approval to follow suit, the harm to amici could be enormous. For it will be a relatively simple task for all localities intent on securing monopoly profits from their commercially hauled waste to avoid the application of *Carbone* by simply taking title to their processing and disposal facilities. Just as in *Carbone*, obtaining financing for such transactions would be easy once the localities are assured that they can legally direct all local waste to those local facilities. As even the Second Circuit recognized, "[i]t is unquestionably the case that the interstate market for waste disposal services would suffer if numerous jurisdictions were to impose restrictions like these on private entities that engage in trash collection." Pet. App. 17a.

The potential impact on amici could be devastating. If the Sussex and Charles City County landfills cannot be assured of sufficient volumes of interstate MSW to render them econ-

omically viable, a major source of public revenues would be lost. As noted, landfill fees currently account for 39% of the revenues of the Sussex County government, and 15% of the revenues of the Charles City County government. If these revenues were to be lost or significantly diminished, the counties would either have to raise taxes substantially or curtail public services. Sussex County, for example, is in the process of securing financing for a new elementary school, which will cost about $23 million. That school, however, cannot be built without the assurance of continued landfill revenues, which in turn depend on the free flow of interstate commerce. Charles City County estimates that at its current tax rates it would need an additional $400 million in taxable private investment in order to generate tax receipts equivalent to the amount of income the county receives from its landfill operations. Both counties are also ill-equipped to handle even a temporary decline in their revenues, as each currently has reserves of only $1.5 million.

If this Court were to uphold respondents' ordinances, the other option for amici and other jurisdictions that depend on interstate waste disposal revenues is equally undesirable. Were amici faced with decreasing revenues resulting from the reduction in volume of MSW imported into Virginia due to flow control ordinances, they too might attempt to secure similar restrictions to ensure access to locally generated waste. Currently, Virginia exports approximately 241,000 tons of MSW each year to other states such as Georgia, Kentucky, Maryland, North Carolina, Pennsylvania, South Carolina, Tennessee, and West Virginia. *See NSWMA Research Bulletin 05-2*, *supra*, at 5. One can reasonably expect that Virginia localities would seek to curtail those exports if the localities were not able to rely on imports from other states. Moreover, the states to which Virginia exports MSW are themselves exporters of MSW. *Id.* For example, Georgia exports to Alabama, Illinois, South Carolina, Tennessee and Virginia. Alabama, in turn, exports to Florida,

Mississippi, and Tennessee. *Id.* These interstate MSW shipments "represent routine partnerships among states and municipalities." *Id.* at 9.

Flow control laws like the ones at issue in this case threaten such trading relationships, which is precisely the scenario the Commerce Clause was intended to prevent. The premise of the Commerce Clause is that the United States is "a common market in which state lines cannot be made barriers to the free flow of both raw materials and finished goods in response to the economic laws of supply and demand." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 803 (1976) (citation omitted). As this Court noted in *Carbone*, "[t]he central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." 511 U.S. at 390 (citation omitted). Allowing respondents to circumvent *Carbone* would encourage these kinds of destructive retaliatory measures and foster the "economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes* v. *Oklahoma*, 441 U.S. 322, 325-326 (1979).

This Court, moreover, should be particularly reluctant to disrupt the interstate market and investment-backed expectations that have been fostered by the Court's decision in *Carbone*. By ruling out flow control measures that block interstate commerce, the Court's decision provided the legal certainty upon which investments could be predicated. As noted above, the entire interstate market in MSW disposal has grown by leaps and bounds since *Carbone*, in reasonable reliance on the safeguards that decision provided. The Court should not upset the settled expectations of the market by overruling *Carbone* or by effectively accomplishing the same thing through an exception that would allow the decision to be circumvented virtually at will. *See Quill Corp.* v. *North*

Dakota, 504 U.S. 298, 316-17 (1992) (declining to depart from prior precedent when to do so would upset settled expectations and noting importance of "stability and orderly development of the law") (internal citation omitted).

Adhering to the letter and spirit of *Carbone* is particularly appropriate because this Court is not the last word on this subject. Unlike its authority in other areas of constitutional law, Congress has "plenary and supreme authority" over interstate commerce. *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 423 (1946). This means that Congress can always limit the holding of *Carbone* if it desires, provided that it does so clearly and expressly. *See Quill*, 504 U.S. at 318. Congress has considered such legislation in every session since 1987, but has consistently declined to enact laws that permit state and local interference in the interstate MSW processing and disposal market. *See CRS Report*, *supra*, at 1. Respondents and their allies are free to continue these legislative efforts if they desire. But in the meantime, this Court should continue to adhere to its decision in *Carbone*, which has provided needed certainty to amici and other jurisdictions that benefit greatly from the uninhibited interstate trade that the Constitution envisions and *Carbone* has fostered.

CONCLUSION

For the foregoing reasons, and those set forth in petitioners' brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

HENRY A. THOMPSON, SR.
SUSSEX COUNTY ATTORNEY
P.O. Box 342
108 Maifeld Ave.
Waverly, VA 23890
(804) 834-2780

JONATHAN S. FRANKLIN*
KIMBERLY S. WALKER
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466

B. RANDOLPH BOYD
CHARLES CITY COUNTY ATTORNEY
14 E. Main Street
Richmond, VA 23219
(804) 643-6611

* Counsel of Record

Counsel for Amici Curiae